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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

No. 386

KISS & COMPANY, INC.,

*Appellant,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

JOHN B. GAGE,
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

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**Civil Action No. 7694**

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RISS & COMPANY, INC.,

*Plaintiff,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

*Defendants*

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THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, AND OTHER CLASS I RAILROADS,

*Interveners*

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## STATEMENT AS TO JURISDICTION

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In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Riss & Company, Inc., submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and decree of the District Court entered in this cause.

### Opinion Below

The opinion of the District Court for the Western District of Missouri has not yet been reported. A copy of the per curiam opinion of the District Court containing the findings of fact, conclusions of law and judgment and a copy of the final decree are attached hereto as Appendix A.

## Jurisdiction

The judgment of the District Court was entered on May 7, 1953. A motion for new trial was filed May 15, 1953 and denied by order of the District Court on July 7, 1953. A petition for appeal is presented to the District Court herewith, to-wit, on August 24, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *American Trucking Associations* v. *United States*, 326 U. S. 77; *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236.

## Questions Involved

1. Where the Interstate Commerce Commission has authority to issue an order only under Section 204(c) of the Interstate Commerce Act, may the order be sustained upon judicial review by attributing to the administrative proceeding compliance with Section 204(c) and with the Commission's Rules of Practice relating thereto although the Commission specifically refused to comply with those requirements in the administrative proceeding.

2. Whether the Interstate Commerce Commission may refuse a motor carrier an opportunity for hearing under Section 204(c) of the Interstate Commerce Act because the Commission believes the materials in its files sustain a petition for cease and desist order filed by competing carriers.[1]

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[1] All the points raised in the Assignment of Errors are also presented. The questions presented stated above set forth the major issues.

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## Statutes Involved

Section 204(c) (49 U. S. C. § 304(c)) of the Interstate Commerce Act, as amended, and Sections 5, 7 and 10(e) (5 U. S. C. §§ 1004, 1006, 1009(e)) of the Administrative Procedure Act are set forth in Appendix B hereto.

## Statement

Appellant, hereinafter referred to as Riss, is a common carrier by motor vehicle holding operating authority issued by the Interstate Commerce Commission (Commission). Riss brought this action to suspend, set aside and permanently enjoin orders of the Commission dated June 2, 1952 and July 14, 1952 requiring Riss to cease and desist transporting dangerous explosives under Riss' authority in Docket No. MC-200 (Sub-No. 60 TA) beyond the scope of the operations specified in an appendix to the report accompanying the order dated June 2, 1952.

On February 26, 1952 the Eastern Railroads and Class I Railroads in Western Territory, interveners in this case, hereinafter referred to as the Railroads, filed a document with the Commission entitled "Docket No. MC-200 Sub 60 TA, Petition for Issuance of a Cease and Desist Order." Riss filed a motion to dismiss and answer to the Railroads' petition on April 1, 1952, urging in support of the motion that the cease and desist order sought by the Railroads could be issued by the Commission, if at all, only in formal complaint proceedings.

The Commission on a six to three vote issued its order dated June 2, 1952, without further proceedings and without affording an opportunity for hearing. The Commission denied Riss' motion to dismiss, holding that the Railroads' allegations and requested relief could be granted on petition, under Rule 102 of the Commission's General Rules of

Practice covering requests for relief not otherwise provided for in the Rules of Practice.

On June 30, 1952 Riss filed a petition for reconsideration and vacation of the order dated June 2, 1952 and again requested notice and an opportunity for hearing on the issues raised by the Railroads. The Railroads filed a reply to Riss' petition on July 9, 1952. The Commission denied the Riss petition by order dated July 14, 1952.

Riss filed its complaint in the United States District Court for the Western District of Missouri, Western Division, on July 18, 1952. The United States and the Commission filed answers to the complaint. The Railroads intervened in the action and also filed an answer to the complaint.[2] A hearing was held before the District Court on November 12, 1952. There was introduced at this hearing as evidence copies of the orders sought to be reviewed and the docket of the Commission in MC-200 (Sub 60 TA) as well as certain prior operating authorities. In its complaint and at oral argument before the District Court Riss contended that the Commission had statutory authority to issue the orders under review only under Section 204(c) of the Interstate Commerce Act which, in terms, required that notice and opportunity for hearing be afforded and that the orders were void because the Commission had refused to afford Riss notice and hearing. Riss argued that the action of the Commission violated the terms of Section 204(c) of the Interstate Commerce Act and Sections 5, 7 and 8 of the Administrative Procedure Act pertaining to administrative hearings. Riss also argued that the procedure adopted by the Commission in this case violated the

[2] The Railroads' petition filed with the Commission was filed on behalf of Eastern Railroads and Class I Railroads in Western Territory. The intervention in the case was on behalf of some sixty-two rail carriers described in the motion for leave to intervene as "substantially all of the Class I Railroads in the United States. . . ."

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Commission's General Rules of Practice and the Commission's established procedure in such cases, noting that the Commission had never previously entered orders of this type without proper notice and hearing in a formal complaint proceeding. The United States, the Commission and the Railroads urged that Section 204(c) of the Interstate Commerce Act did not apply and that the Commission's orders were proper, although entered without formal hearing.

The District Court, on May 7, 1953, issued its per curiam opinion and its final judgment and decree dismissing Riss' complaint. A motion for new trial was filed May 15, 1953 and denied by the District Court July 7, 1953. The Court in its per curiam opinion found that the Commission had statutory authority to issue the cease and desist order here involved only under Section 204(c) of the Interstate Commerce Act which in terms required notice and hearing. The District Court also held that the Railroads could invoke the Commission's statutory authority under Section 204(c) only by the filing of a "complaint" and that the Commission could not entertain the petition of the Railroads under the Commission's General Rule of Practice No. 102 since other Rules covered the filing of complaints. The Court, noting that the Commission had refused to treat the Railroads' petition as a complaint, nevertheless, held that the Railroads' petition was in the Court's opinion a sufficient complaint under the Commission's General Rules of Practice. The Court also concluded that, since a copy of the petition had been mailed to Riss, the notice required by Section 204(c) of the Interstate Commerce Act was satisfied. The Court further concluded that the Railroads' petition and the motion to dismiss and answer filed by Riss constituted an adequate hearing.

The Court held, however, that it could not review the

findings and orders of the Commission because Riss had not brought to the Court enough of the record before the Commission, in particular a certificate issued to Riss in another Commission docket in 1950. The Court held that the record before the Commission consisted of matters of which the Commission had taken official notice and matters contained in the petition of the Railroads and motion to dismiss and answer of Riss. The Court held that all of the matters considered essential had been identified by the Commission in its report and order. The Court held that, although the record consisted largely of matters of which the Commission had taken official notice, these matters must be introduced in evidence by Riss in the District Court. The Court concluded it could not take judicial notice of such matters, including the certificate issued to Riss, necessary to judicial review of the order. The Court on this basis found that Riss had not sustained its burden of proof and dismissed the complaint.

**The Questions Involved Are Substantial**

The District Court revamped the entire proceeding before the Commission in order to sustain the Commission orders here involved. The District Court found that affirmative orders such as involved in this case requiring a motor carrier to cease and desist conducting operations because unlawful could be entered by the Commission only under Section 204(c) of the Interstate Commerce Act. Section 204(c) in terms provides that such an order may be issued by the Commission only upon the filing of a complaint and after notice and hearings. Having concluded that the Commission was required to comply with Section 204(c) if the orders were to be valid, the District Court: (1) found the petition of the Railroads was a "sufficient" complaint under Section 204(c) although Riss' motion to dismiss because it

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was not a complaint had been denied by the Commission on the ground that it was a proper petition under Rule 102 of the Commission's General Rules of Practice; (2) found that Riss had notice of the complaint since a copy of the Railroad petition (which the Court, but none of the parties before the Commission, construed to be a complaint) had been mailed to Riss; (3) found that Riss had been accorded a hearing although the Commission had consistently denied the request of Riss for an opportunity to introduce evidence on the issues at a hearing and denied to Riss any opportunity to examine and rebut any evidence offered by the Railroads; (4) found that the record of the hearing consisted of all matters considered essential by the Commission which were identified in the report or orders of the Commission. The District Court, having thus clothed what the Commission held to be a petition proceeding with all the attributes of a formal complaint, notice, hearing and a record, concluded that its consideration of the merits of the order was halted at the threshold because Riss had not introduced in the evidence before the Court vital parts of the "record" before the Commission. Thus, the District Court held that it could not take judicial notice of a certificate issued to Riss and to which reference was made by all parties in the District Court although the Court also found that the Commission could and did take official notice of the certificate.

The issues presented by this appeal are of importance not only to Riss but to the entire motor carrier industry and to the administration of the Interstate Commerce Act. The decision of the District Court makes adherence by the Commission to the provisions of the Act and its published Rules of Practice almost discretionary. The Commission is to be free to act in any manner it chooses confident that the reviewing court will reconstruct the administrative pro-

ceeding to conform to the applicable requirements and statutory authority. This reduces a proceeding before the Commission to hopeless confusion. It is impossible to know the basis for the Commission's action because it may be changed by the reviewing court. Hearings may be conducted wholly upon official notice and opportunity to present evidence denied because it is concluded that the unheard evidence either is not relevant or could not affect the result. The Commission may, as here, drastically restrict the service which may be performed by a motor carrier solely on the basis of a petition and without a hearing. It is submitted that this is not only novel in the decisions and action of the Commission; this is a novel concept of administrative law.

1. The District Court plainly erred in failing to set aside the orders of the Commission upon finding that such orders could have been entered only upon complaint and after notice and hearing under Section 204(c) of the Interstate Commerce Act, 49 U. S. C. § 304(c), and upon finding that the Commission and the parties did not consider the proceeding before it as being upon complaint. The primary issue before the Court was whether the orders could be entered only under Section 204(c) or whether the orders could be entered under other provisions of the Act. It was never contended by any party before the Commission or before the Court that the Railroads' petition was a complaint. Counsel who represented the Railroads before the Commission made apparent the parties' understanding of the nature of the Commission proceeding when he stated to the District Court (Tr. p. 61):

> This is not a complaint proceeding. The Commission has no complaint before it and whatever the provisions of Section 204(c) relating to a hearing are they don't apply to this case.

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The District Court, however, after finding a complaint required, concluded that the Railroads' " 'petition' is a sufficient *Complaint* within Section 204(c) and the Commission's General Rules of Practice governing complaints."

The District Court's conclusion squarely contradicts the determination by the Commission, noted by the Court, that it was acting under its Rule 102, which provides a remedy on petition when not otherwise provided for in its Rules, and not under its Rules governing complaints. Had the Commission in fact concluded, as Riss requested in its motion to dismiss and as the District Court held, that the issues raised by the Railroads were appropriate only upon complaint, the Commission then would have been compelled to grant Riss' motion to dismiss. The Court, therefore, in finding that the Railroads' petition and the Commission's proceeding complied with Section 204(c) of the Act and the Commission's General Rules of Practice governing complaints has substituted its judgment for that of the Commission. The District Court erroneously concluded not to review the orders on the basis on which they were in fact made but upon wholly new and different concepts of what the Commission might have done. Compare *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 (1943). The District Court's opinion moreover has created a method by a process of judicial conversion by which the Commission may enter findings and compel a motor carrier to cease and desist operations without reference to the requirements of the statute under which the Commission must act.

2. The District Court erred in finding that the mailing of a copy of the Railroads' petition to Riss constituted notice of a complaint under Section 204(c) of the Interstate Commerce Act, 49 U. S. C. § 304(c). Neither the Railroads, Riss, nor the Commission ever considered the petition as a

complaint. The Commission's denial of Riss' motion to dismiss the petition makes that clear. The Court, however, by determining for the first time that the Railroads' petition "is a sufficient complaint," found that service of that petition constituted notice to Riss of a complaint. The function of notice is to apprise the parties of the issues involved and of the type of proceeding in which those issues are to be tried. Section 5(a) of the Administrative Procedure Act, 5 U. S. C. § 1004(a), provides in part:

> Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted.

Riss was never apprized of the time, place or nature of the hearing or that a hearing was being conducted under Section 204(c) of the Interstate Commerce Act or under the Commission's General Rules of Practice governing complaints. On the contrary, all of the parties understood that there would be no hearing before the Commission because the Commission did not deem Section 204(c) of the Act applicable. The Court's reconstruction of the proceedings by the District Court in order to find notice had been given to Riss violated Section 5(a) of the Administrative Procedure Act.

3. The District Court erroneously found that the Railroads' petition and Riss' motion to dismiss and answer supplemented by official notice by the Commission of applications for certificates, proceedings before the Commission in relation thereto, and orders of the Commission thereon constituted an adequate hearing under Section 204(c) of the Interstate Commerce Act, 49 U. S. C. § 304(c). Riss was entitled to a hearing at which it would know the evidence submitted and to be considered. Riss was entitled to an

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opportunity to cross-examine witnesses, to inspect materials relied upon by the Railroads and to offer its own evidence in rebuttal or explanation. The Supreme Court has consistently held that these are the basic requisites of a fair hearing. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88. Riss was denied such a hearing although Riss specifically requested a hearing before the Commission. Moreover, the Supreme Court has stated that the Commission cannot by the use of the implement of official notice deprive the parties of a fair hearing. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515. The Commission cannot take official notice of matters in its files which were not presented at a hearing and which, therefore, Riss had no opportunity to explain or rebut. *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274. Section 7(d) of the Administrative Procedure Act, 5 U. S. C. § 1006(d), provides that an administrative agency must afford a party an opportunity to rebut when an agency's decision rests on official notice.

The extent to which the substitution of official notice for a full and fair hearing deprives the parties of testing the Commission's findings upon judicial review is amply illustrated in this case. None of the parties knew what facts and proceedings the Commission had considered in reaching its conclusions beyond the meager statement in the report of the Commission. In this respect it is significant to note that the District Court's summary of the facts relating to the operating authority involved is far more specific and detailed than the Commission's. The parties did not know if the Commission had considered and relied upon materials from its files beyond those specifically mentioned in the report or whether on the contrary it had rejected as immaterial everything except those specifically set out in the report. This produced the novel situation in the District

Court of the defendants arguing that letters, orders, dockets and other papers culled from any and all files of the Commission supported the Commission's order although the materials were not mentioned in the report of the Commission. Neither the parties nor the District Court could state with certainty the full extent of the facts upon which the Commission had or had not considered.

Further, it is conceded that the report of the Commission contained findings which could not be supported on any basis. The Commission stated in its report of June 2, 1952 that although the Defense Department was aware of the filing of the Railroads' petition, that Department had not intervened in the proceeding. The counsel for the Commission conceded in the hearing before the District Court that there was nothing in the record to support the Commission's statement (Tr. p. 73). The lack of a record of a hearing precluded effective judicial review because it was impossible to ascertain with any degree of certainty the basis for the findings and action of the Commission.

It is important to note that this case is the first in which the Commission has entered a cease and desist order compelling a motor carrier to restrict its operations without a full hearing upon a complaint. The Commission has consistently with this single exception afforded opportunity for full hearing upon such complaints even though the only controverted issue was the proper interpretation of the terms of the authority. *Akers Motor Lines, Inc.* v. *Malone Freight Lines, Inc.*, 53 M. C. C. 353; sustained sub nom. *Malone Freight Lines, Inc.* v. *United States*, 107 F. Supp. 946, (D. C. N. D. Ala., 1952); aff'd 344 U. S. 925, (No. 505 October Term, 1952).

4. The District Court erred in refusing to review the Commission's findings and orders. This conclusion leaves Riss without any forum in which the scope of its operating

authority may be determined on the merits. The District Court found that Riss had not introduced in evidence enough of the "record" before the Commission to enable the Court to review the Commission's findings and orders. Specifically, the Court held that the absence of a certificate of public convenience and necessity issued to Riss in Docket No. MC-200 (Sub-No. 46) on February 21, 1950 precluded such review. This was clearly in error. The Commission's interpretation of Riss' operating authority in Docket No. MC-200 (Sub-No. 60 TA) turned on whether the Commission had properly limited Riss' authority in Docket No. MC-200 (Sub-No. 60 TA) to the scope of the certificate in Docket No. MC-200 (Sub-No. 46) or whether Riss' authority in Docket No. MC-200 (Sub-No. 60 TA) was broader than the certificate in Docket No. MC-200 (Sub-No. 46). The precise language of the certificate in Docket No. MC-200 (Sub-No. 46) was irrelevant to the determination of these questions. The Commission, as the Court noted, appended to its report of June 2, 1952, which was in evidence before the District Court, the complete description of the points and places and the manner of performing service specified in the certificate issued in Docket No. MC-200 (Sub-No. 46). There was, therefore, no barrier to the Court's review of the orders. Nevertheless, the Court refused to review the orders and further refused to afford Riss a new trial at which it could present the certificate in order to obtain judicial review.

If the District Court's refusal to review the findings and orders of the Commission is sustained, Riss will forever be precluded from having a determination of the scope of its operating authority upon the merits. *Interstate Commerce Commission* v. *Southwest Freight Lines*, 86 F. Supp. 587 (D. C. W. D. Mo. W. D., 1949); *Interstate Commerce Commission* v. *G & M Motor Transfer Co., Inc.*, 64 F. Supp. 302 (D. C. W. D. N. Car., 1945). Riss firmly believes that the

action of the Commission, drastically restricting Riss' authority to transport dangerous explosives, was improper. Riss believes that if it were afforded a proper hearing and an opportunity to establish its case of record, the Commission would make findings in Riss' favor or the Commission's findings would not be sustained on review.

We believe the questions presented by this appeal are substantial and that they are of importance to all motor carriers subject to the Interstate Commerce Act.

Respectfully submitted,

JOHN B. GAGE,
A. ALVIS LAYNE, JR.,
JOHN H. KREAMER,
H. CHARLES EPHRAIM,
*Counsel for Plaintiff-Appellant.*

## APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Civil No. 7694

RISS & COMPANY, INC.,

*Plaintiff,*

*vs.*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

*Defendants,*

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, and Other Class I Railroads,

*Interveners*

PER CURIAM:

Riss and Company, Inc. is an extensive motor carrier operating under various certificates bearing the general Commission docket number designation of MC-200. Among such certificates is MC-200 (Sub. No. 60TA), which is a temporary certificate to transport "*Dangerous Explosives,* * * *." A number of railroads filed (February 27, 1952), with the Commission, a "Petition for Issuance of a Cease and Desist Order" against Riss to cease and desist from operating "beyond the scope of the territory authorized in Sub 60TA * * *" and "* * * to confine its operations under Sub 60 TA to the routes and points authorized in the certificate issued Riss and Company under MC 200 Sub 46 dated February 21, 1950." To this petition, Riss filed an answer which included a motion to dismiss the petition. Without further hearing on the petition and the answer, the Commission filed its report and entered its order (on June 2, 1952), that Riss cease and desist "on or before July 10, 1952" from transportation of dangerous explosives under MC-200 (Sub-No. 60TA) "beyond the scope of the operations specifically described in the appendix to the said report * * *" (64 M. C. S. 531). Riss filed a petition to "reconsider and vacate" this order. Railway petitioners

filed reply to this petition to reconsider. On July 14, 1952, the petition to reconsider was denied without further hearing. This proceeding is to review these Commission orders of June 2, 1952 and July 14, 1952.

Here plaintiff, in contending that these two orders of the Commision are erroneous, states its position (of course, as to the order of June 2, 1952) as follows:

> "* * * erroneous and void as a matter of law and is arbitrary and capricious and without foundation either in fact or in law because: (1) the findings of fact and conclusions and orders were entered without notice and hearing in violation of the provisions of Part II of the Interstate Commerce Act, 5 U. S. C. § 1000 *et seq.*, although notice and hearing was requested by plaintiff; (2) the operating authority in Docket Number MC-200 (Sub-No. 60TA), initially granted in 1942, continues in full force and effect by virtue of other orders of the Commission and Section 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b); and (3) the Commission has, without good cause, appearing, restricted the operating rights granted, solely on grounds of interpretation, contrary to the terms and provisions of the operating authority granted."

The Commission contends that this proceeding was solely one to interpret the scope of temporary certificate Sub-No. 60TA: that the proceeding before it was "upon a petition, not a complaint," therefore the report and order are based on Sec's. 204(6), 210a(c) "and numerous judicial decisions construing Commission authority to interpret authority issued by it" and *not* under Sec's. 204(c) or 212(a); that the report findings and the order are based solely upon Commission official records and no other evidence was "required or necessary" to its interpretation; that a "formal hearing" is required only where facts, provable by other than its official records, are reasonably necessary for interpretation of operating authority.

The United States contends that plaintiff received adequate notice; and that, though not required to grant a hearing, the Commission did so giving plaintiff every oppor-

tunity to present every contention, of fact or law, it desired in opposition to the petition of the railroads.

The intervening railroads contend that Section 210a(a), giving power to the Commission to grant temporary certificates "without hearings or other proceedings", inherently includes power to interpret the scope of such grant without "hearings or other proceedings"; that the duty of the Commission, under Section 204(a)(6), "to administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith" necessarily includes power to interpret the meaning of its temporary grants and to enforce such interpretation; that the only *fact* issue raised by interveners' petition was that of transgression by Riss of its granted authority under Sub 60TA and, which issue was removed from dispute by admissions of Riss in its answer to interveners' petition; that there is no showing that the interpretation of Sub 60TA by the Commission is erroneous, arbitrary, capricious and without foundation.

## I. Issue as to Notice and Hearing

The proceeding before the Commission was one, by the Railroads, to secure relief from injury they allege resulted from operation by Riss beyond the scope of the temporary certificate Sub 60TA. The relief sought was that the Commission "require Riss to confine its operations under Sub 60 TA to the routes and points authorized in the certificate issued Riss & Company under MC-200 Sub 46 dated February 21, 1950".[1] This proceeding required the determination of two matters: the scope of lawful operations by Riss under Sub 60TA and whether Riss was exceeding such lawful scope. The scope of such lawful operations was a matter of interpretation of the extent and terms of Sub 60TA—*in the situation here*, this would seem to be a question of law. Whether Riss was exceeding its authority was a purely factual matter of what it was doing measured by what it had authority to do. Although this "petition" before the Commission was made up of these two elements, the petition is

[1] The certificate issued on February 21, 1950 defined the "grandfather" rights as to general commodities (not including explosives).

a unit when we come to the question of the power of the Commission to consider and act upon it.

The Commission has the power to interpret the meaning of a motor carrier certificate issued by it. Such is a necessary power to enable it to perform its duties under Section 204(a)(6) of the Act. The Commission can exercise this power even though it does so in a proceeding which seeks only a declaratory order construing a certificate.[2] But where such interpretation is an integral part of a pleading before the Commission which prays positive action therein by the Commission based upon such interpretation, we should treat the pleading as a unit.

Treating the so-called "petition" as a unit, it is nothing more nor less than a "complaint" within the meaning of Section 204(c) of the Act. That section sets forth the only method by which the Commission can, by its own action, "compel" compliance with the provisions of the Act or the requirements of the Commission thereunder, without resort to the Courts under Sections 222(a) or 222(b).[3] This "petition" is the kind of thing meant by "complaint" as used in 204(c).

Treating the "petition" of the Railroads as a complaint within the meaning of Section 204(c), we are met by the contentions of Riss (raised in its answer and motion to dismiss before the Commission) that the "petition" does not comply with the Rules of the Commission setting out the requirements for "complaints" and that, if the matters urged in the "petition" are proper for complaint proceedings, Rule 102 is not applicable.

The Commission regarded this proceeding as being under its Rule 102, which is one of its adopted General Rules of Practice, regulating procedures before it. Rule 102 is a catch-all providing a remedy where no other Rule does so. Since there are other Rules governing "complaints" and since this "petition" is, in essence, a "complaint", those

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[2] Carroll Trucking Company Interpretation of Certificate, 52 M.C.C. 664.

[3] We are not impressed by the contention that a *temporary* certificate is not within Section 204(c) as fully as a permanent certificate.

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Rules and not Rule 102 applies here. Thus this issue as to the Rules resolves into whether this "petition" meets the Rules requirements governing "complaints". Plaintiff sets forth (Appendix B of its main brief) what it states are all of the Rules governing "complaints" pertinent here. Accepting this unchallenged statement, this "petition" sufficiently complies therewith to overcome this objection by plaintiff. We conclude that this "petition" is a sufficient *complaint* within Section 204(c) and the Commission's General Rules of Practice governing complaints.

Another contention of plaintiff is that a "cease and desist" order cannot be made by the Commission where the effect thereof would be to deny Riss the right (in an action against Riss under Section 222(a) or 222(b) to place in issue the scope of the certificate; and that such effect results where the Commission, prior to an action under 222(a) or 222(b), has ruled on the legality of the particular operations. The force of this position is, that unless Riss is given the notice and granted the hearing accorded by Section 204(c),[4] plaintiff will be denied opportunity to challenge the interpretation of Sub 60TA as made by the Commission in a Judicial proceeding against it. This position is sound (Southwest Freight Lines v. I. C. C., 8 Cir., 184 F. 2d 149, 151; I. C. C. v. G & M Motor Transfer Co., 64 F. Supp. 302, 303; I. C. C. v. Consolidated Freightways, Inc., 41 F. Supp. 651, 655). This is the legal doctrine that orders of the Commission are not subject to "collateral" attack in Judicial proceedings but must be tested Judicially in direct review of such orders. Such reviews are provided for, in the Act, only by Section 204(c). That section provides for *complaints* before the Commission which must, by it, be considered and determined *upon due notice and proper hearing*. Therefore, the validity of these orders depends upon whether the "notice and hearing", required by Section 204(c), was accorded by the Commission in this proceeding which resulted in the cease and desist order.

(a) *Notice.* The record here shows service on Riss of a copy of the Railroads' petition on February 26, 1952 (Exh.

[4] See also 49 U.S.C.A. Section 17 (9).

20, p. 117). Riss sought and obtained extension of time, until April 1, to answer (Exh. 20, p. 164). Riss filed answer and motion to dismiss on April 1 (Exh. 20, p. 89). There is no merit in the contention that Riss did not have proper and sufficient notice.

(b) *Hearing.* It is contended that plaintiff did not ask for a hearing before the Commission. This does not matter. Section 204(c) requires a hearing as a basis for Commission action upon a complaint. Even if such hearing might be waived (which we do not determine) yet there would have to be clear showing of waiver of such an important right. Here, the answer and motion of Riss, before the Commission, do not present such showing. The Petition for Reconsideration filed by Riss with the Commission emphatically denies any waiver and insists upon the right of a hearing (Exh. 20, p. 81).

We think the situation here created before the Commission brought the proceedings before it within Section 204(c) requiring the "hearing" prescribed by that section.[5]

We have been cited no determination of the Commission based upon its construction of a certificate and resulting in an order against the certificated carrier where the Commission did not accord a hearing in respect to such construction by it.

The United States contends that "although the Commission was not required to grant a hearing, it did so, and plaintiff was given every opportunity to present every contention, either in fact or in law, in opposition to the railroads' petition" (Br. pp. 4-5). Also the intervening railroads contend that, even if Section 204(c) be applicable (which they deny), yet the requirement for a hearing thereunder "was fully satisfied by the state of the record" (Br. p. 34).

This "hearing" was made up of the pleadings before the Commission alone. The report and order of the Com-

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[5] Apparently, the Commission has heretofore usually accorded hearings even where the issue before it was solely the interpretation of the meaning of a certificate issued to a motor carrier under the Act and no other relief was sought. *Carroll Trucking Company Interpretation of Certificate*, 52 M.C.C. 178, 54 M.C.C. 664.

mission of June 2, 1952, were made without further or other appearances of the parties beyond these pleadings and without opportunity to offer evidence. These pleadings set out the contentions of the parties. Baldly stated, the main contention was whether Riss was operating beyond the territorial limitations of its temporary permit to transport explosives under certificate MC-200 (Sub-No. 60TA). Resolution of this main issue depended upon determination of two matters: the limits of authority under Sub-60TA; and what operations Riss was actually carrying on in the transportation of explosives.

What Riss was actually doing as to such transportation is obviously a question of fact. We think this matter is not a disputed fact. In its answer to the petition before the Commission (Exh. 20, p. 99), Riss states:

> "During the course of the proceedings in Sub-No. 84 which have lasted over four years, Riss has shown extensive operations under Sub-No. 60TA which the railroads now claim to have been illegal. Riss, to petitioners' (railroads) knowledge, has been operating its temporary authority in Sub-No. 60TA for almost six years and now for the first time the railroads question the propriety of these operations."

We think these quoted statements are direct admissions that the actual operations of Riss are those which the railroads declare are beyond the limits of Sub-No. 60TA as they construe such limits and which Riss asserts are within such limits as it construes them. This removed this matter of fact as an issue before the Commission.[6]

The remaining issue before the Commission was the interpretation of the territorial limits of its Sub-No. 60TA. Such character of issue may be one of law [7] or one of mixed law and fact [8] depending upon the particular situation.

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[6] The endeavor of Riss to weaken the meaning of this admission (Reply Brief, p. 14, note 10) is not convincing.

[7] *Interstate Common Carrier Council of Maryland, Inc. et al.* v. *United States et al. (Md.)*, 84 F. Supp. 414, 420, aff. per cur., 338 U.S. 843, 54 M.C.C. 664.

[8] *Carroll Trucking Company Interpretation of Certificate*, 52 M.C.C. 178.

Here, we think it is one of law. No disputed *facts* seem to be involved or necessary to be resolved.[9]

The issue and the pertinent situation seem clear. The issue is whether the territorial limits of Sub-No. 60TA for transportation of explosives are the same as defined in a permanent certificate granted Riss in Sub-No. 46 for the transportation of other Commodities.

As shown by the evidence introduced *in this Court*, the situation is as follows as to various pertinent proceedings before the Commission. Riss (in 1942) purchased (with Commission approval) the rights of another carrier, Monark, which was operating under a temporary "grandfather" certificate (docketed as MC-30077) with certain Sub-numbers—one of which, Sub-No. 6 TA, applied to transportation of explosives.[10]

There followed extensive proceedings before the Commission and in the Courts (Riss & Co., Inc. v. United States et al., 100 F. Supp. 468, aff. per cur. 342 U. S. 937, rehearing den. 343 U. S. 937) as to the rights acquired from Monark on the "grandfather" claims asserted under MC-200 Sub-No. 46 for transportation of *commodities generally*. The permanent certificate covering Sub-No. 46 was issued on February 21, 1950. It did not allow all of the operations claimed under the temporary certificates.

While the just described proceedings as to Sub-No. 46 were in progress, there were other proceedings, respecting transportation of explosives, going on. February 25, 1942, Monark had been granted temporary certificate (Exh. 7a) to transport explosives and ordnance supplies "To, from and/or between points and places now served by applicant as set forth in * * * MC-30077 and Sub-Nos. 1 to 5 inclusive. This certificate was for 180 days and was given Sub

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[9] When we speak of "facts" in this connection, we exclude such matters as applications for certificates, proceedings before the Commission in relation thereto, and orders of the Commission thereon. In a sense, all of such matters are facts which are parts of the record made by the Commission at a hearing—whether by formal introduction or by official notice.

[10] The general docket number of Riss was MC-200. Upon its purchase of Monark rights, these rights were docketed under Riss MC-200—the commodity rights being designated as "Sub-No. 46."

No. 6TA under MC-30077. This certificate was renewed on April 9, 1942, for 180 days (Exh. 8) expiring October 6, 1942 (see Exh. 9 p. 2, footnote 4). September 28, 1942, Riss was authorized to purchase Monark and its operating rights (specifically naming Sub-No. 6TA).

October 3, 1942, Riss filed application to transport "Dangerous Explosives and Ordnance Supplies To, from and/or between points and places now served by applicant as set forth in certificates issued by and applications pending with the Interstate Commerce Commission under Dockets MC 30077 and Sub Nos. 1 to 5 inclusive, Monark Freight System, Inc. * * * purchased by Riss & Company, Inc. * * * ". This application set forth acquisition by Riss of MC-30077 Sub-No. 6TA, expiration thereof on October 6, 1942 and sought continuance of "the present temporary authority in effect until December 31, 1944" (see Exh. 3 attached to application). This application was docketed under MC-200 as Sub-No. 45TA. This application being for "an extension of operation" had attached a map (Exh. 2 thereto) showing the existing Riss Authority and also the extension from Monark. This application is Exhibit 10 here. November, 1942, a temporary certificate was issued Riss until Decemer 31, 1944 (Exh. 11). This certificate was extended until December 31, 1945 by general order (Exh. 18, pp. 20-21). Further until March 1, 1946 by general order (Exh. 18, pp. 36-37).

March 1, 1946, Riss applied to transport "Explosives and U. S. Army Ordnance Stores" over "regular" routes "between points named in I. C. C. Order of February 3, 1945 in * * * MC-200, Sub 46 (formerly Monark Motor Freight System Docket MC 30077)" until June 30, 1946 (Exh. 13). Certificate was granted April 15, 1946 until June 30, 1946 for transportation of "*Dangerous Explosives,* To, from and/or between points and places authorized to be served in connection with Docket Nos. MC 30077 and effective sub numbers thereunder which were acquired by applicant herein" (Exh. 16). This proceeding was given Docket No. MC-200 Sub 60TA. This certificate was extended (by general order) until March 31, 1947 (Exh. 20, pp. 133-4). March 28, 1947, this certificate was extended until September 27,

1947 (Exh. 20, p. 121). September 30, 1947, certificate Sub-No. 60TA (along with other Sub-Nos. of Riss) was extended until "finally determined" in MC-200 Sub-No. 84 (Exh. 21).

August 22, 1947, Riss filed an application for permanent authority covering several of its ten temporary certificates, including Sub-No. 60TA. This application was given docket number MC-200 Sub-No. 84. After extended hearings, orders were entered denying the application. A judgment of this Court sustaining this order (96 F. Supp. 452) was reversed (per curiam) by the Supreme Court (341 U. S. 907) for failure to observe proper administrative procedure. Promptly thereafter (April 26, 1951), the Commission set aside all proceedings in Sub-No. 84 and ordered all temporary authorities involved therein to be continued in force until final determination of Sub-No. 84 unless terminated earlier for good cause. Since then, there have been extensive hearings in Sub-No. 84.

The foregoing has set out the issue and the situation as to which that issue is to be determined. To summarize: The issue was whether the Riss authority to transport explosives under Sub-No. 60TA was territorially defined in the permanent certificate issued Riss in Sub-No. 46. Apparently, the Commission determined this issue from its own records, made up of applications and of orders granting the temporary and permanent certificate proceedings as to Sub-No. 46 and the temporary certificates as to transportation of explosives—which latter had eventually resulted in temporary certificate Sub-No. 60TA.

In the proceedings before the Commission, the petition of the railroads expressly identified the applications and orders of the Commission upon which they rely for their interpretation of the meaning— as to territorial operation —of Riss under Sub-No. 60TA. In its answer and Motion to Dismiss, Riss brings in one additional proceeding, namely Sub-No. 84. Apparently, the applications and orders named in these pleadings were all which the parties (railroads and Riss) thought bore upon the interpretation of Sub-No. 60TA.

How far an administrative body—such as this Commission—can take "official notice" of its own records, proceed-

ings and orders is not at all clear but it does have that power to some extent.[11] It would seem that this power would extend, at least, to "notice" of such orders and applications therefor as have been directly drawn to its attention in pleadings before it; which are parts of the historical development of the immediate issues before it; and which relate directly to the rights of a party to such issues. This should be particularly true where the issue is one purely of law and where reference to earlier acts of the Commission is solely to aid in resolving such issue. Here the earlier applications and orders which were considered pertinent and determinative by the Commission are identified in its Report and its Order of June 2, 1952. From the Report and this Order the Commission makes clear what it considered in reaching its decision. Such is the situation here.

Not only did the parties direct the attention of the Commission to the particular prior proceeding pertinent to the interpretation of Sub-No. 60TA but each side (in its pleadings) presented its views and written arguments for the interpretation it deemed correct. The only thing lacking was oral argument. As to that, no *specific* request for "oral" argument was ever asked. What Riss sought was an entire hearing (which normally would include oral argument). We conclude that the requirement of an adequate hearing before the Commission has been met.

## II. Issue of Continued Authority of Sub-No. 60TA

Plaintiff contends that the operating authority under temporary Sub-No. 60TA continues "in full force and effect by virtue of other orders of the Commission and Section 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b)."

We are unable to agree that plaintiff has here established that the Commission failed to consider any of its orders pertinent to its decision. The temporary authority under Sub-No. 60TA was expressly related to and dependent upon temporary Sub-No. 46. Both of those temporary author-

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[11] *United States et al.* v. *Pierce Auto Freight Lines, Inc. et al.*, 327 U.S. 515, 529-530.

ities as well as the permanent certificate Sub-No. 46 were considered by the Commission. Also, were the various extensions of Sub-No. 60TA, including that in Sub-No. 84.[12]

We are unable to agree that plaintiff has established any violation of or departure from Section 9(b) of the Administrative Procedure Act.

### III. Issue of Restrictive Interpretation

This contention by plaintiff has two prongs. First, is the broad position that the interpretation of the Commission is basically wrong because the authority under Sub-No. 60TA is not limited by the territorial restrictions in permanent certificate Sub-No. 46 but includes all points which it claimed to serve as successor in interest to the Monark "grandfather" rights as well as to all points covered by certain certificates formerly held by Monark in subnumbered proceedings. The second is that, even if limited by

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[12] Commissioner Mahaffie (joined by Commissioners Lee and Knudson) dissented here on grounds stated as follows:

> "Applicant's temporary authority was by an order dated September 30, 1947, continued so as to expire upon final determination of its application for permanent operating rights in No. MC-200 (Sub-No. 84). No. MC-200 (Sub-No. 84) has been heard at length. In the meantime, extensive operations under the outstanding temporary authority are being conducted. We may find that they should be continued or be curtailed. But until we do on the basis of the record now available to us we should not grant such a petition as this, unless it is required by law. As to the law applicable in the circumstances, I think the provisions of section 9(b) of the Administrative procedure Act on which the present order is based may still be considered controlling."

Whether it might have been advisable for the Commisison to decline determination of this matter until it had acted upon a permanent certificate in the proceeding under Sub-No. 84, was, we think, a matter of discretion on the part of the Commission and not a question of power under Section 9(b) of the Administrative Procedure Act. Surely, it is not the law that the Commission cannot, after due notice and hearing, determine and prevent violation of a temporary certificate authority whenever such violation is brought to its attention by a proper complaint, as here.

Moreover, the Report states (p. 534):

> "If there is a need for additional transportation service, it may be met by the filing of further properly supported applications for temporary or permanent authority."

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the points in permanent Sub-No. 46, yet the Commission has further circumscribed its operations to less than those limits.

Our consideration of these two contentions is halted, at the threshold, by the state of the record upon which our determination must be based.

Our immediate concern is whether the "record" made before this Court is legally sufficient to present to us the "record" which was before the Commission and was the basis for its Order of June 2, 1952. We think this *sufficiency* depends upon three successive steps: (1) is it clearly ascertainable from the Order of June 2 and the accompanying Report just what matters the Commission considered; (2) are such matters capable of being presented to this Court as being the record which was considered by the Commission; and (3) has enough of this record before the Commission been brought to this Court to enable us to decide the issues here.

(1) All of the matters considered essential by the Commission are clearly identified either in the Order or in the Report. This is done by definite references instead of setting out. They are applications for operating authority (temporary or permanent) or orders thereon. All of them are links in the chain directly relating to Sub-No. 60TA. There is no difficulty in ascertaining and knowing just what each of these matters is. This is not an instance of consideration by the Commission of matters either unknown or unknowable, as was the situation in Ohio Bell Tel. Co. v. Public Utilities Comm. of Ohio, 301 U. S. 292, 300-305.

(2) Whether such matters are capable of being presented to this Court as being the record which was considered by the Commission presents the problems of official notice by the Commission of its own records and of evidence in this Court of such records. We think the Commission can take such official notice. Also, we think such official notice is sufficiently manifested—for purposes of Judicial examination —where (as here) such matters are definitely and clearly identified by the Commission as having been considered by it. They thus are capable of being Judicially examined,

*provided* they are properly brought before the examining Court.

How can they be properly brought before such Court? We take Judicial notice of these applications and orders of which the Commission took official notice (Robinson v. B & O R. R. Co., 222 U. S. 506, 512). Such matters can be brought before the Court, as being the record before the Commission, only by being introduced as evidence (when properly identified as being the matter officially noticed by the Commission).

In examining the action of the Commission, the interest of the Court is centered in and controlled by what was considered by the Commission. In the situation here, the Report and Order thereon have definitely pointed out the matters considered by the Commission; and, from that information, the parties can make a record in this Court which will include all that the Commission considered, even though it may here require evidence to cover matters officially noticed by the Commission.

(3) Orders of the Commission are presumed to be valid and the burden of overthrowing them is upon the attacker (*Swift & Co.* v. *U. S.*, 343 U. S. 373, 382; *I. C. C.* v. *Jersey City*, 322 U. S. 503, 512; *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602). Such overthrow must be established on the record made in this Court as being the record before the Commission. Such burden is here upon Riss.

There remains the problem of whether the record here is sufficient for our determination of the issues here presented by Riss. In this connection, we must have in mind three basic contentions as follows: (a) that, properly construing temporary certificate Sub-No. 60TA, Riss has not exceeded the authority thereunder; (b) that such proper construction of Sub-No. 60TA is not confined to the same territorial limits as set forth in permanent authority Sub-No. 46, but should be measured by the temporary authority of Sub-No. 46 (which included the "grandfather" claims and certain temporary certificates acquired from Monark); (c) that, even if limited by permanent authority Sub-No. 46, such

limitations have been further contracted arbitrarily and capriciously by ignoring the effect of the right, under temporary Sub-No. 60TA, to transport explosives "To, from and/or between" the points covered in permanent Sub-No. 46.

Solution of each of these issues requires a consideration of permanent Sub-No. 46. The Report here has attached to it, as an "Appendix", a detailed statement of the points from, to and between which Riss is authorized to transport dangerous explosives under its temporary Sub-No. 60TA. The Report (p. 534) states

> "The appendix herein details the extent of Riss' authority to transport dangerous explosives under No. MC-200 (Sub-No. 60TA), from, to, and between the same points and in the same manner that it is authorized to transport other commodities as evidenced in (permanent) certificate No. MC-200 (Sub-No. 46)."

The Report is expressly incorporated in the Order of June 2, 1952 and Riss is ordered to cease and desist from "transportation of dangerous explosives in interstate or foreign commerce under No. MC-200 (Sub-No. 60TA) which are beyond the scope of the operations as specifically described in the appendix of the said report, and that Riss & Company, Inc., shall thereafter confine its operations in the transportation of dangerous explosives under the grant of temporary authority in No. MC-200 (Sub-No. 60TA) to the routes, points and territories, and in the manner set forth in the appendix to the report."

Permanent Sub-No. 46 is thus shown to be an all important matter considered and acted on by the Commission. It is not in evidence in this Court. The statement in the Report that the Appendix follows the provisions of permanent Sub-No. 46 is not evidence here of that fact. In this situation, we must hold that Riss has not brought here enough of the record before the Commission for us to decide, in its favor, the issues it raises here.

Riss has not sustained its burden of overthrowing the Orders. The complaint must be and is

Dismissed.

(S.) KIMBROUGH STONE,
*Judge, United States Court of Appeals, retired;*
(S.) R. M. DUNCAN,
*Judge, United States District Court;*
(S.) ALBERT A. RIDGE,
*Judge, United States District Court.*

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## APPENDIX "B"

### Statutes Involved

Interstate Commerce Act, Part II, 54 Stat. 922.

Sec. 204(c), 49 U. S. C. § 304:

Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Administrative Procedure Act, 60 Stat. 237.

Sec. 3(a), 5 U. S. C. § 1002:

RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of

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its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Sec. 5, 5 U. S. C. § 1004:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for an agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Sec. 7, 5 U. S. C. § 1006:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order

be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 10(e), 5 U. S. C. § 1009:

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of

an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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# Supreme Court of the United States

October Term, 1953

**No. 386**

RISS & COMPANY, INC., A CORPORATION, *Appellant*,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*,

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, AND OTHER CLASS I RAILROADS, *Intervenors-Appellees*.

*On Appeal from the United States District Court for the Western District of Missouri*

## BRIEF OF RISS & COMPANY, INC., IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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WILSON - EPES PRINTING CO. - RE 7-6003 - WASHINGTON 1, D. C.

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# Supreme Court of the United States

October Term, 1953

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**No. 386**

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RISS & COMPANY, INC., A CORPORATION, *Appellant*,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*,

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, AND OTHER CLASS I RAILROADS, *Intervenors-Appellees*.

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*On Appeal from the United States District Court for the Western District of Missouri*

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## BRIEF OF RISS & COMPANY, INC., IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

Pursuant to Rule 12, Paragraph 3, and Rule 7, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellant, Riss & Company, Inc., respectfully presents its Brief opposing appellees' motions to affirm the judgment of the three-judge District Court entered May 7, 1953. Appeal from the judgment was allowed on August 24, 1953. The Interstate Commerce Commission, appellee, and the Railroads, intervenors-ap-

pellees, each filed a motion to affirm on September 8, 1953. The United States, appellee, filed its motion to affirm on September 11, 1953.

## I.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellees, for various and conflicting reasons, without regard to prior contentions, the Commission's findings, or the three-judge District Court's findings, erroneously state that the appeal presents no substantial question.

Each appellee in one manner or another urges that the only issue before the Commission concerned interpretation of appellant's temporary operating authority in Docket No. MC-200 (Sub-No. 60TA). The Commission and the Railroads argue that the Commission has authority to interpret temporary operating authority without a complaint or notice and hearing required by Section 204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c). The United States, as well as the Commission and the Railroads, argues that there was a hearing to the extent necessary, namely to the extent that the Commission deemed materials in its files necessary for ascertaining the scope of appellant's temporary operating authority in Docket No. MC-200 (Sub-No. 60TA).

The three-judge District Court rejected appellees' contentions that the Commission properly could have conducted its proceedings under provisions of the Interstate Commerce Act other than Section 204(c), or under a published General Rule of Practice of the Commission other than those governing complaints. The District Court, however, reconstructed the proceedings before the Commission and found compliance with Section 204(c) and the Commission's General Rules of Practice governing complaints.

At each stage in this case, before the Commission, before the District Court, and now before this Court, appellant has been required to meet new arguments, new hyperbole, and new documents from the Commission's files which are urged in support of the orders here under review. Appellees' motions to affirm demonstrate the process of shuffling which has characterized this case from the outset. Appellees request this Court to affirm on grounds which were rejected by the District Court as well as on grounds never urged before the District Court.[1] The arguments advanced by appellees emphasize the basic error committed by the District Court in reconstructing the proceedings before the Commission and in judging each step by the Court's standards without regard for established Commission procedure, the understanding of the parties and of the Commission during the proceedings before the Commission, principles established by this Court's decisions, or the provisions of the Administrative Procedure Act.

The District Court, after reconstructing and sustaining the proceedings before the Commission, declined to review the orders here involved on their merits. The sole ground offered by the District Court for not reviewing was that appellant had failed to bring before the Court enough of the record before the Commission. Specifically, the District Court found that the absence of appellant's certificate of public convenience and necessity in Docket No. MC-200 (Sub-No. 46) precluded review. That the lower court's action was unfounded is amply demon-

[1] For example, the Railroads urge in their motion to affirm that appellant did not exhaust its administrative remedies. The Railroads, in their answer to appellant's complaint in the District Court, admitted that appellant had exhausted its administrative remedies and never urged otherwise before the District Court.

strated in appellees' motions to affirm. The Railroads, for example, in this connection state:

> In its motion for new trial, [appellant] contended that the order in question was sufficiently before the court, that the court should take judicial notice of the order, that there was no question which needed to be considered in the light of the scope of the order, and then proceeded to re-argue the merits of the case. The other parties in one fashion or another granted that the order was sufficiently before the court, and the interested defendants, namely, the railroads, argued the merits *in extenso* in arguing the motion for new trial. The court dismissed the motion for new trial without opinion or discussion. Obviously, therefore, the court considered all the arguments of all the parties presented to it at that time, including the merits, in dismissing the motion for new trial, and, therefore, ultimately dismissing the complaint, fully affirmed the I.C.C.

The variety of contentions made by appellees in support of affirming manifests the complete confusion which has characterized this case from its outset. The only thing certain in the entire proceedings is the effect which the orders here involved will have upon appellant. Appellant's temporary operating authority will be emptied of significance. Appellant will be denied authority to continue to transport explosives to and from most of the places shipping and receiving explosives within the territory covered by its operating authority.

Because of the rampant confusion demonstrated in appellees' motion to affirm, it is imperative that the facts pertaining to the controversy as well as the facts pertaining to the proceedings before the Commission and the findings of the Commission and of the District Court be considered in detail at this time. Such consideration will demonstrate that appellees' contentions in support of their motions to affirm are without substance and that the questions involved on this appeal are of substantial im-

portance to the entire motor carrier industry as well as to appellant.

The report of the Commission, dated June 2, 1952, in this proceeding is attached to this Brief as Appendix A. This report will appear in the published reports of the Commission at 54 M.C.C. 531-42.

**A. The District Court Rejected Appellees' Contentions That Appellant Was Not Entitled to Notice and Hearing Under Section 204(c) of the Interstate Commerce Act and the Commission's General Rules of Practice Covering Complaints.**

Before the District Court appellees urged, on a variety of grounds, that the orders here involved were properly issued under provisions of the Interstate Commerce Act other than Section 204(c). The District Court rejected these contentions *in toto*. Appellees again attempt to raise the same issues before this Court.

Appellees urge that the relief requested by the Railroads and that granted by the Commission was simply interpretation of appellant's operating authority in Docket No. MC-200 (Sub-No. 60TA). Appellees cite as conferring power upon the Commission to interpret operating authority Section 204(a)(6) of the Interstate Commerce Act, 49 U.S.C. §304(a)(6), which reads:

> To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.

The District Court noted:

> The Commission has the power to interpret the meaning of a motor carrier certificate issued by it. Such is a necessary power to enable it to perform its duties under Section 204(a)(6) of the Act.

The District Court, however, found that the relief requested by the Railroads was not simply interpretation but a request

> that the Commission "require Riss to confine its operations under Sub 60TA to the routes and points authorized in the certificate issued Riss & Company under MC-200 Sub 46 dated February 21, 1950."

The relief granted was precisely that requested. The orders here involved compel appellant to restrict its transportation of explosives under its operating authority in Docket No. MC-200 (Sub-No. 60TA) to the routes and points where it may transport commodities other than dangerous explosives under a certificate issued in Docket No. MC-200 (Sub-No. 46) on February 21, 1950. The District Court found that the orders here involved could only have been issued under power conferred upon the Commission by Section 204(c) of the Interstate Commerce Act and not by virtue of any general power conferred in Section 204(a)(6).[2] The provi-

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[2] The Commission also apparently urges in its motion that the findings of the Commission upon which the orders here involved were based would be subject to attack in any subsequent action against appellant in a District Court to assess criminal penalties or to enjoin operations under, respectively, Sections 222(a) or 222(b) of the Interstate Commerce Act, 49 U.S.C. §§ 322(a) and 322(b). The Commission argues that the District Court erred in this connection. The District Court stated and found:

> "The force of [appellant's] position is, that unless [appellant] is given the notice and granted the hearing accorded by Section 204(c), [appellant] will be denied opportunity to challenge the interpretation of Sub 60TA as made by the Commission in a Judicial proceeding against it. This position is sound [citing cases]. This is the legal doctrine that orders of the Commission are not subject to 'collateral' attack in Judicial proceedings but must be tested Judicially in direct review of such orders."

Appellant directs the Court's attention to the decisions cited by the Commission, which are the same ones as cited by the District Court, and clearly support the finding of the District Court.

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sions of Section 204(c) of the Interstate Commerce Act and not of Section 204(a)(6) would govern even if the Railroads had sought solely an interpretation of appellant's operating authority and the Commission had acted accordingly. As the District Court stated:[3]

> We have been cited no determination of the Commission based upon its construction of a certificate and resulting in an order against the certificated carrier where the Commission did not accord a hearing in respect to such construction by it.

In their insistence upon avoiding the implications for this appeal of the requirements of a complaint and notice and hearing in Section 204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c), appellees urge that because the operating authority involved is temporary operating authority issued under Section 210a(a) of the Act, 49

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[3] This was not a petition by a motor carrier seeking clarification of its own operating authority. Under such circumstances there may be cause for dispensing with the requisites of a hearing and the Commission has, on occasion, acted accordingly, presumably under Section 204(a)(6). *Carroll Trucking Company, Interpretation of Certificate*, 52 M.C.C. 178. In the present case proceedings were instituted before the Commission by the filing of a petition by appellant's competitors, the railroads. Under such circumstances, in an adversary proceeding, the Commission has without known exception other than in this case required compliance with Section 204(c) of the Act and its General Rules of Practice governing complaints, referring the matters to an examiner for hearing and deciding on the record made upon such hearing. For example: *Fleetlines, Inc., v. Osbourn Trucking Company*, 53 M.C.C. 149; *Akers Motor Lines, Inc.*, v. *Malone Freight Lines, Inc.*, 53 M.C.C. 353, sustained *sub nom. Malone Freight Lines, Inc.*, v. *United States*, 107 F. Supp. 946 (D.C.N.D. Ala.), aff'd 343 U.S. 925; *Garment Truckmen Ass'n of New Jersey* v. *Middle Atlantic States Motor Carrier Conference, Inc.*, 53 M.C.C. 761; *Campbell Sixty-Six Express, Inc.*, v. *Frisco Transportation Company*, 43 M.C.C. 641. Appellant cited these and several other Commission decisions on this point to the District Court.

U.S.C. §310a(a), the requirements of Section 204(c) do not apply.[4] Thus, the Commission urges:

> If the Commission, in its discretion, may grant a temporary certificate without hearing or other proceeding, as the statute provides, the interpretation thereof must require no less discretion or different procedure.

In the same vein the Commission argues:

> To sustain the technical contentions of Riss herein would be a dangerous precedent, in respect to Commission discretion in issuing temporary authority, requiring much more time and careful study of applications than has heretofore been given, particularly as to those relating to the needs of the Defense Department.

Appellees made the same arguments before the District Court, which brushed them all aside, simply stating in a footnote:

> We are not impressed by the contention that a *temporary* certificate is not within Section 204(c) as fully as a permanent certificate.

Appellees, nevertheless, continue in their attempt to infuse into this case the notion that the Commission need not give so careful consideration prior to the issuance of an order compelling a motor carrier to cease and desist conducting operations when the motor carrier claims such operations are proper under temporary authority as when the motor carrier cites permanent au-

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[4] Appellees also urge that the proceedings were proper under Rule 102 of the Commission's General Rules of Practice. In this connection the District Court found:

> "Rule 102 is a catch-all providing a remedy where no other Rule does so. Since there are other Rules governing 'complaints' and since this 'petition' is, in essence, a 'complaint', those Rules and not Rule 102 applies here."

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thority.[5] These attempts by appellees to distinguish permanent from temporary operating authority are wholly devoid of merit.

Temporary operating authority, during its term, is no more elastic or uncertain than permanent authority. Temporary operating authority can be issued only to meet an immediate and urgent need. Section 210a(a), Interstate Commerce Act, 49 U.S.C. §310a(a). The terms used in granting such authority, therefore, must be framed to meet such a need. The consequence of operations without appropriate operating authority from the Commission are no different whether the motor carrier contends that the operations were conducted under temporary or permanent authority. The results in this case, so far as appellant is concerned, of the Commission's cease and desist order are no different because the Railroads made allegations of operations allegedly conducted under temporary operating authority than the results would be if the Railroads' allegations were made concerning permanent authority.

The Commission did not purport in this case to be revising or revoking any or all of appellant's operating

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[5] Not only do they make the same arguments made before the District Court, appellees add new ones. For example, in support of their contention (now for the first time made) that appellant had not exhausted its administrative remedies, the Railroads argue that appellant could have at any time, and did on August 25, 1953, file applications under Section 210a(a) of the Act, 49 U.S.C. §310a(a), for temporary operating authority covering points prohibited under the orders here involved. The railroads, searching the Commission's files for anything that might conceivably be urged in support of the orders here involved, neglected to point out that the Department of Defense of the United States supported the new applications, that the Railroads filed extensive protests, and that the Commission has never acted upon the applications.

authority in Docket No. MC-200 (Sub-No. 60TA). The majority of the Commission stated:

> The temporary authority [in Docket No. MC-200 (Sub-No. 60TA)] is now conditioned to expire upon final determination of the application in No. MC-200 (Sub-No. 84), in which Riss seeks permanent authority to transport dangerous explosives.
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> We do not consider the allegation that the importance of Riss' service to the Department of Defense has been ignored by the filing of the railroads' petition relevant to the issue herein.[6]

Appellant's application for permanent authority in Docket No. MC-200 (Sub-No. 84), to which the majority referred, was before this Court in *Riss & Company, Inc.* v. *United States*, 341 U.S. 907. The Commission urged on that appeal as it urges now that appellant was not entitled to a hearing. As a result of this Court's *per curiam* decision, the Commission ordered a hearing *de novo* on the application in Docket No. MC-200 (Sub-No. 84). The temporary operating authority in Docket No. MC-200 (Sub-No. 60TA) *inter alia*, which had been rescinded by the Commission after the District Court's decision on Sub-No. 84, was reinstated and made effective pending final determination of the application in Sub-No. 84. The Railroads participated as protestants in Sub-No. 84 from the outset. When a new hearing was held on the application in Sub-No. 84, during the latter part of 1951 and the early part of 1952, extensive testimony

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[6] The majority also stated:

"Moreover, the Department of Defense has not intervened herein, although aware of the filing of the railroads' petition."

Counsel representing the Commission admitted before the District Court that there was nothing in the Commission's records to show that the Department of Defense was aware of the pendency of the railroads' petition. (Transcript page 73). The Commission in its motion to affirm apparently accuses the Department of Defense of joining with appellant in seeking to perpetuate appellant's transportation of explosives under the operating authority here involved.

was presented on behalf of appellant, the Department of Defense of the United States, numerous railroads, shipping groups, motor carriers, states, cities, and other organizations. Appellant pointed these facts out to the Commission in its motion to dismiss and answer to the Railroads' petition. Appellant urged that the application proceedings in Sub-No. 84 were the appropriate forum for determining the Railroads' claims of unwarranted damage resulting from appellant's operations.[7] The minority of the Commission (three) accepted this position, citing Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §1008(b).

Since the Commission argues in its motion that the sole issue before the Commission was interpretation of appellant's operating authority in Docket No. MC-200 (Sub-No. 60TA), and since the majority of the Commission deemed the existing need for appellant's service irrelevant, it is a contradiction and an absurdity for the Commission also to urge in its motion that sustaining appellant's contentions on this appeal will have serious consequences upon the issuance of temporary operating authority. The latter argument makes sense *only* if the Commission now is admitting that something other than interpretation was involved in this case. It is meaningful only if the Commission, in issuing temporary operating authority, acts on the assumption that it can revise the authority granted at its whim, without considering the scope of the authority granted, the need which led to issuance, or the need existing at the time it decides upon revision.

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[7] In this connection, appellant noted:

"During the course of the proceedings in Sub-No. 84 which have lasted over four years, Riss has shown extensive operations under Sub-No. 60TA which the railroads now claim to have been illegal. Riss, to petitioners' knowledge, has been operating its temporary authority in Sub-No. 60 TA for almost six years and now for the first time the railroads question the propriety of these operations."

**B. The District Court Erred When, After Finding That the Commission Had Conducted the Proceeding in Disregard of Section 204(c) of the Interstate Commerce Act and the Commission's General Rules of Practice Governing Complaints, It Found That the Statutory Requirements and the Requirements of the Rules Were Met.**

Despite the fact that the District Court rejected all contentions of appellees that appellant was not entitled to a complaint and notice and hearing under Section 204(c) of the Interstate Commerce Act and the Commission's General Rules of Practice governing complaints, the District Court reconstructed the proceedings before the Commission and determined that appellant had been accorded the requisite notice and hearing on a complaint. In connection with showing the invalidity of the District Court's determination and the lack of merit in appellees' contentions that appellant had a hearing even though not entitled to one, it is necessary first to describe in detail the proceedings before the Commission, the facts in controversy before the Commission, the findings of the Commission, and the findings of the District Court. It then can be demonstrated that appellant was not accorded the requisite notice and hearing on a complaint before the Commission.

1. *The Commission Issued The Orders Here Involved In Disregard Of Section 204(c) Of The Interstate Commerce Act And Its General Rules of Practice Governing Complaints.*

On February 26, 1952, the Railroads filed a petition entitled "Petition for Issuance of a Cease and Desist Order" in Docket No. MC-200 (Sub-No. 60 TA). On April 1, 1952, appellant filed its motion to dismiss and answer to the Railroads' petition. Appellant urged, in support of its motion to dismiss, that the relief sought

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by the Railroads could only be obtained from the Commission, if at all, in a complaint proceeding. The majority of the Commission (six) in the report which is part of the order of June 2, 1952, overruled appellant's motion to dismiss, finding that the Railroads' petition:

> properly may be considered under rule 102 of our General Rules of Practice, and it is accepted for filing.

On June 20, 1952, appellant filed its petition for reconsideration, pointing out the lack of statutory authority for the action taken by the Commission on a petition and requesting notice and hearing in accordance with Section 204(*c*) of the Interstate Commerce Act and the Commission's General Rules of Practice governing complaints. The Railroads filed a reply to appellant's petition on July 9, 1952. By order dated July 14, 1952, the Commission denied appellant's petition.

The Commission's orders of June 2, 1952 and of July 14, 1952 are the orders involved in this appeal.

2. *Serious Issues of Fact and Law Were Raised Before The Commission.*

(a) The Railroads' Petition.

The Railroads, in their petition of February 26, 1952, sought a Commission order compelling appellant to cease and desist conducting operations which they alleged were being conducted and which they alleged were unlawful. The railroads alleged that appellant was conducting operations under Docket No. MC-200 (Sub-No. 60TA), which was issued on April 15, 1946, in excess of the scope of appellant's certificate of public convenience and necessity in Docket No. MC-200 (Sub-No. 46), which was issued on February 21, 1950, and that such operations were unlaw-

ful. The terms of appellant's operating authority in Docket No. MC-200 (Sub-No. 60TA) are as follows:

DANGEROUS EXPLOSIVES,

To, from, and/or between points and places authorized to be served in connection with Docket Nos. MC 30077 and effective Sub Nos. thereunder which were acquired by Applicant herein.

The Railroads urged that appellant's certificate in Docket No. MC-200 (Sub-No. 46), was issued on the basis of an application, originally given Docket No. MC-30077, filed by appellant's predecessor under the "grandfather" proviso of Section 206(a) of the Interstate Commerce Act, 49 U.S.C. §306(a). They stated that the Commission had issued an order on February 3, 1945, granting a portion of the "grandfather" claims and they argued that the authority granted appellant on April 15, 1946, in Docket No. MC-200 (Sub-No. 60TA), was limited in scope to the authority recommended in the Commission's order of February 3, 1945 in Docket No. MC-200 (Sub-No. 46), plus the subsequent portions of the "grandfather" claims which were granted by the Commission.

(b) APPELLANT'S MOTION TO DISMISS AND ANSWER.

Appellant, in its motion to dismiss and answer filed on April 1, 1952, contended that the operations authorized by the temporary operating authority issued in Docket No. MC-200 (Sub-No. 60TA) on April 15, 1946, were equal in scope to the full extent of the "grandfather" claims of appellant's predecessor, originally given Docket No. MC-30077, as well as to the scope of certain certificates which had been issued to appellant's predecessor. Appellant pointed out that the word "authorized" in the operating authority in Docket No. MC-200 (Sub-No. 60TA) was used by the Commission as a term of reference to include the scope both of appellant's predecessor's "grandfather"

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claims and its certificates. Appellant also pointed out that the Commission's order of February 3, 1945, recommending the grant of some of the "grandfather" claims was not final and that, in fact, the Commission had, by order dated October 4, 1948, granted certain portions of the "grandfather" claims which had been denied in the order of February 3, 1945.[8]

Appellant pointed out that the provisions of Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. §310a (a), authorized the issuance of temporary operating authority only upon a showing of an immediate and urgent need for which no other service is available. Appellant noted that the "grandfather" claims and the proceedings relating to them were in no way connected with the transportation of explosives. Appellant argued that ac-

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[8] The Commission urges in its motion concerning the temporary operating authority granted to appellant in Docket No. MC-200 (Sub-No. 60TA) on April 15, 1946:

> "More than a year previously the Commission had on February 3, 1945, decided and specifically described the 'grandfather' authority of Riss & Company, under MC-200, Sub 46 (as stated in the application 'formerly Monark Motor Freight System Docket MC 30077).' The language of that application and the granting of the certificate do not permit of any other interpretation than that the scope of the authority granted, in No. MC-200 (Sub-60TA), was limited precisely to routes and points named in the 'order of February 3, 1945 in x x x No. MC-200, Sub 46.'"

The Commission's facts are clearly in error. Further portions of the "grandfather" claims were granted by order of the Commission dated October 4, 1948. During the entire time of the pendency of the "grandfather" claims, appellant was entitled to conduct operations to the full territorial extent of those claims. Appellant's right to conduct such operations was confirmed in a memorandum opinion of the three-judge District Court for the Western District of Missouri on February 9, 1948. The "grandfather" claims remained pending until after the issuance of the certificate by the Commission on February 21, 1950 and at least until the decision of the three-judge District Court for the Western District of Missouri, on September 27, 1951, in *Riss & Company, Inc.* v. *United States*, 100 F. Supp. 468, aff'd 342 U. S. 937.

ceptance of the Railroads' contentions necessarily would mean that the temporary operating authority issued in Docket No. MC-200 (Sub-No. 60TA) on April 15, 1946 was of an indeterminate scope, whose bounds could be determined only by subsequent action of the Commission in a wholly unrelated proceeding.

(c) The Commission's Findings of Fact.

The majority of the Commission found that appellant's predecessor (Monark Motor Freight System, Inc.)

> originally was granted temporary authority in 1942, prior to the transfer of its operating rights to Riss, to transport dangerous explosives to the same extent as that set forth in No. MC-200 (Sub-No. 60-TA).

The majority found:

> During the entire period of adjudication of the claimed "grandfather" rights [in Docket No. MC-30077, which later was incorporated within Docket No. MC-200 (Sub-No. 46)] and since then, with the exception of a few days, Riss has held continuing temporary authority to transport dangerous explosives to the same extent as set forth in No. MC-200 (Sub-No. 60 TA). The temporary authority is now conditioned to expire upon final determination of the application in No. MC-200 (Sub-No. 84), in which Riss seeks permanent authority to transport dangerous explosives.

The majority stated:

> Certificate No. MC-200 (Sub-No. 46) embraces both the authority finally determined in the "grandfather" application and the certificated authority held by Monark and transferred to Riss.
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> The principal issue before us, however, is whether Riss, under the terms of its temporary authority in No. MC-200 (Sub-No. 60-TA), may provide service on dangerous explosives to the same extent that it claimed operating rights in the Monark "grandfather" application, or whether Riss, since the issu-

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ance and effectiveness of certificate No. MC-200 (Sub-No. 46), is authorized to transport dangerous explosives only to the same extent as it may transport other commodities as evidenced by such certificate.

The majority found: that the temporary operating authority held by appellant in Docket No. MC-200 (Sub-No. 60TA) was by its terms "directly tied to the points authorized to be served in No. MC-30077"; that the "grandfather" claims in Docket No. MC-30077 [later incorporated within Docket No. MC-200 (Sub-No. 46)], which were not confirmed, are not "authorized" points; and that appellant's operating authority in Docket No. MC-200 (Sub-No. 60TA) is equal in territorial scope to the territorial scope of the certificate issued in Docket No. MC-200 (Sub-No. 46). The majority appended to its report the specific designation of the points, routes and limitations specified in the certificate in Docket No. MC-200 (Sub-No. 46).

3. *The District Court Reconstructed The Proceedings Before The Commission And Sustained The Proceedings As Reconstructed.*

The District Court found:

> The Commission regarded this proceeding as being under its Rule 102, which is one of its adopted General Rules of Practice, regulating procedures before it. Rule 102 is a catch-all providing a remedy where no other Rule does so. Since there are other Rules governing "complaints" and since this "petition" is, in essence, a "complaint", those Rules and not Rule 102 applies here.

The District Court then determined for itself:

> Plaintiff sets forth (Appendix B of it main brief) what it states are all of the Rules governing "complaints" pertinent here. Accepting this unchallenged statement, this "petition" sufficiently complies therewith to overcome this objection by plaintiff. We

> conclude that this "petition" is a sufficient *complaint* within Section 204(c) and the Commission's General Rules of Practice governing complaints.

The Court found that appellant had proper and sufficient notice because appellant had received a copy of the Railroads' petition and had filed a motion to dismiss and answer.

The Court found that appellant had not waived a hearing and that the

> "hearing" was made up of the pleadings before the Commission alone. The report and order of the Commission of June 2, 1952, were made without further or other appearances of the parties beyond these pleadings and without opportunity to offer evidence.

The Court held that the issue of whether appellant was conducting the operations alleged by the Railroads was a question of fact which, the Court found, was not disputed since appellant had admitted in its motion to dismiss and answer that it was conducting the operations alleged. The Court held that the interpretation of appellant's operating authority in Docket No. MC-200 (Sub-No. 60TA) was, under the circumstances in this case, solely a question of law. The Court stated, concerning the Commission's power to take official notice under the circumstances:

> It would seem that this power would extend, at least, to "notice" of such orders and applications therefor as have been directly drawn to its attention in pleadings before it; which are parts of the historical development of the immediate issues before it; and which relate directly to the rights of a party to such issues. This should be particularly true where the issue is one purely of law and where reference to earlier acts of the Commission is solely to aid in resolving such issue. Here the earlier application and orders which were considered pertinent and determinative by the Commission are identified in its

> Report and its Order of June 2, 1952. From the Report and this Order the Commission makes clear what it considered in reaching its decision. Such is the situation here.
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> Not only did the parties direct the attention of the Commission to the particular prior proceeding pertinent to the interpretation of Sub-No. 60TA but each side (in its pleadings) presented its views and written arguments for the interpretation it deemed correct. The only thing lacking was oral argument. As to that, no *specific* request for "oral" argument was ever asked. What Riss sought was an entire hearing (which normally would include oral argument).

The District Court held, without citing any cases, "that the requirement of an adequate hearing before the Commission has been met."

4. *There Was No Complaint Or Notice Or Hearing.*

Not only did the District Court reconstruct the proceedings which in fact took place before the Commission, the Court adopted a unique concept of administrative law. The District Court's determination that the proceedings before the Commission were proper under Section 204(c) of the Interstate Commerce Act and the Commission's General Rules of Practice governing complaints ignored the consistent Commission practice in complaint proceedings and the understanding of the parties during these proceedings before the Commission, the provisions of the Administrative Procedure Act, and prior decisions of this Court.

Appellant respectfully submits that the District Court erred in refusing to set aside the orders here involved after the Court had found: (1) that these orders could only have been entered under Section 204(c) of the Interstate Commerce Act and in accordance with the Commission's General Rules of Practice governing com-

plaints; and (2) that the Commission treated this proceeding under some different authority and in accordance with different procedures. The District Court should not have substituted its judgment in this connection for that of the Commission. Compare *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80.

The District Court should at least have considered the consistent administrative practice of the Commission in connection with complaint proceedings. Compare *United States ex rel Hirshberg* v. *Cooke*, 336 U.S. 210. The Commission without known exception has referred every complaint proceeding for hearing before an examiner and has determined the issues upon the record made at such a hearing.[9] The Commission in its motion to affirm recognizes that fact:

> That kind of hearing [under Section 204(c) of the Interstate Commerce Act] would be before an examiner, for the purpose of introducing testimony of witnesses.

The District Court apparently took the Commission's consistent practice in such cases into consideration in determining whether or not appellant was entitled to a hearing and ignored the Commission's practice in determining whether there was a hearing in this case.

Appellees never disputed appellant's contention before the District Court that the Commission has never in any other case involving similar issues proceeded except upon a complaint, including a hearing before an examiner. Appellees candidly admitted before the District Court that

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[9] See the text and note at note 3, *supra*, concerning some of the cases in which the Commission has followed its consistent practice in complaint proceedings of referring the matters to an examiner for hearing.

the parties before the Commission did not deem this proceeding to be a complaint proceeding. Thus, the Railroads urged before the District Court:

> This is not a complaint proceeding. The Commission has no complaint before it and whatever the provisions of Section 204(c) relating to a hearing are they don't apply to this case. (Transcript page 61).

Before this Court, however, appellees now attempt to rationalize the Commission's action in this case in the light of the reconstruction of the proceedings by the District Court. The Commission, for example, urges that there would have been a regular hearing before an examiner except for the fact that appellant had admitted that it was conducting the alleged operations, leaving no issue of fact to be resolved by such a hearing. The Commission in taking this position, attempts to distinguish *Akers Motor Lines, Inc.*, v. *Malone Freight Lines, Inc.*, 53 M.C.C. 353, sustained *sub nom. Malone Freight Lines, Inc.*, v. *United States*, 107 F. Supp. 946, aff'd 344 U.S. 925. The Commission now urges that the only reason that the Commission referred the complaint in the *Akers* case to an examiner was "that pleadings did not admit actual operations or the legal standing of complainants." The Commission urged before the District Court that the reason that there was a complaint proceeding, including a hearing before an examiner, in the *Akers* case was because complainants did not know that the same type of relief could be obtained by a petition.[10] (Commission's brief before the District Court, page 26).

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[10] As an alternative theory, the Commission in its motion urges that the Commission as a whole "heard" the complaint proceeding, noting that the Commission is authorized to hear testimony and receive other evidence. In this connection, the Commission urges:

> "Had Riss made any showing as to other evidence necessary to the decision, the Commission had authority to receive it

The fact of the matter is that since the Commission did not consider the proceedings before it to be on a complaint, all of the rationalizing arguments of appellees to the effect that there was a hearing on a complaint in this proceeding are without foundation. No one, including appellant, can, at this stage, state what the Commission would have done if it had determined that the matters before it were appropriate for complaint proceedings. Presumably the Commission would have abided by its consistent practice and would, therefore, either have granted appellant's motion to dismiss the Railroads' petition or, if it found the petition met the requirements of a complaint, have referred the issues to an examiner for a hearing.

In concluding that appellant had "an adequate hearing" the District Court, in so far as its opinion discloses, failed even to consider the import of prior decisions of this Court or of the provisions of the Administrative Procedure Act.

The District Court found that appellant had not waived a hearing before the Commission, even if such a hearing could be waived. Appellant's requests for a hearing were denied by the Commission. Appellant, therefore, having requested a hearing, was entitled to a hearing and to observance of its rights under Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004 and 1006. *Riss & Co., Inc.*, v. *United States*, 341 U.S. 907; *United*

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or to refer to a Division, board, or an examiner to hear and receive it."

The theory of the Commission is unique in this case. It, however, demonstrates a position taken by appellees throughout this proceed to the effect that even though the statute provides for a hearing, even though appellant requested a hearing, and even though a hearing before an examiner had been held in every other similar case, appellant must demonstrate its need for a hearing before appellant would be entitled to a hearing.

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*States* v. *L. A. Tucker Truck Lines, Inc.*, No. 18, October Term, 1952, 97 Law Ed. 4. Since Section 204(c) of the Interstate Commerce Act requires the Commission to issue orders such as those here involved only after notice and hearing, the Commission could not properly make findings, decide the issues, or grant the requested relief without notice and hearing. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U.S. 88; *United States* v. *Abilene & S. R. Co.*, 265 U.S. 274. The Commission could not take official notice of matters in its files which were not presented at a hearing and which appellant had no opportunity to explain or rebut. *United States* v. *Abilene & S. R. Co., supra;* Section 7(d), Administrative Procedure Act, 5 U. S. C. § 1006(d). The Commission could not by the use of the implement of official notice deprive appellant of a fair hearing. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515. Appellant was entitled to an opportunity to cross-examine any witnesses presented, to inspect materials relied upon by the Railroads, and to offer its own evidence in rebuttal or explanation. These are the basic requisites of a fair hearing. *Interstate Commerce Commission* v. *Louisville & N. R. Co., supra.* The wisdom of all of these established principles is vindicated by the confusion and uncertainty created by the decision of the District Court in their breach.

The concept of a hearing necessarily must include the concept of a record determined by such a hearing. As this Court has pointed out, the Commission cannot "where rights depend upon facts . . . disregard all rules of evidence, and capriciously make findings by administrative fiat." *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U.S. 88, at 91. Section 7(d) of the Administrative Procedure Act, *supra*, provides that

> [t]he transcript of testimony and exhibits, together with all papers and requests, filed in the proceeding, shall constitute the exclusive record for decision. . . .

This proposition does not exclude the possibility of official notice. On the contrary, it provides a mechanism whereby parties may know of what official notice was taken and be afforded an opportunity to explain or rebut. *United States* v. *Abilene & S. R. Co., supra*; Section 7(d), Administrative Procedure Act, *supra*.

There was no transcript of testimony or of exhibits in this case. As the District Court stated:

> This "hearing" was made up of the pleadings before the Commission alone.

It might, therefore, be assumed that the record in this proceeding was determined by the Railroads' petition and appellant's motion to dismiss and answer. This is apparently the position taken by the Railroads and by the Commission before this Court, urging that these two documents and the documents in the Commission's files to which the Railroads and appellant referred constituted the record before the Commission in this proceeding. It is apparent, however, from the opinion of the majority of the Commission and from the District Court's opinion, that the Commission did not limit its consideration to such documents.

The District Court apparently found that the record in this proceeding before the Commission consisted of all documents in the Commission's files which the Commission considered "pertinent and determinative" and "identified in its Report and its Order of June 2, 1952." The Commission did not, as the Railroads and the Commission indicate in their motions to affirm,[11] limit its con-

[11] The Commission and the Railroads in their motions argue that a determining factor in the Commission's construction of appellant's temporary operating authority in Docket No. MC-200 (Sub-No. 60TA) was the phrasing of appellant's application for that operating authority. This was the same argument made by the Railroads in their original petition instituting the proceeding

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sideration to documents in the Commission's files in Docket No. MC-200 (Sub-No. 60TA). The majority of the Commission in its report made findings concerning the scope of appellant's predecessor's (Monark Motor Freight System, Inc.) temporary operating authority and concerning the temporary operating authority held by appellant prior to that now held by appellant in Docket No. MC-200 (Sub-No. 60TA). Documents in the files relating to these other temporary operating authorities, therefore, must have been considered by the majority "pertinent and determinative" in construing appellant's temporary operating authority in Docket No. MC-200 (Sub-No. 60TA). Under the circumstances, therefore, the Commission and the Railroads now seek to have this Court judge the findings of the Commission on grounds other than those which the opinion of the majority of the Commission adopted. Concerning this argument, this Court has ruled:

> The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, at 87.

Since the Commission did not limit consideration of documents in its files to those referred to by the Railroads and by appellant, it is impossible to state what was the record in this proceeding. The District Court stated that the Commission specifically referred to those documents it considered "pertinent and determinative".

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before the Commission. The report of the majority of the Commission makes no reference to appellant's application. Moreover, the Railroads and the Commission refer to the Commission's order of February 3, 1945 in Docket No. MC-200 (Sub-No. 46). That order also was referred to by the Railroads in their petition instituting this proceeding before the Commission. The majority of the Commission made no reference to that order. It is not possible, therefore, to conclude, from its Report, even that the Commission considered these arguments.

It is not possible to state what other documents in what other files were consulted by the Commission and considered not "pertinent" or "determinative." This technique, nevertheless, under the opinion of the District Court, constitutes "an adequate hearing." Under such a technique, effective judicial review is impossible since it permits the Commission to determine the record upon which review must be predicated but which need not include all of the documents considered by the Commission.[12] Compare *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U. S. 292.

### C. The Court Erred in Refusing To Review The Orders Here Involved On Their Merits.

The District Court did not review the orders here involved on their merits, offering as the sole reason appellant's failure to make a part of the record before the Court the certificate of public convenience and necessity in Docket No. MC-200 (Sub-No. 46).

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[12] It was apparent before the District Court, just as it is apparent before this Court, that none of the parties, including appellant, can state with certainty what was the record in this proceeding before the Commission. Appellant submitted in exhibit form before the District Court all of the documents to which the majority of the Commission had apparently referred in its Report and which were necessary for a review of the orders here involved on their merits. Appellees, particularly the Railroads, objected to the receipt of many of these documents on the grounds that they were not part of the record before the Commission even though those documents must have been the ones to which the majority of the Commission had reference in its Report. After the District Court received appellant's exhibits, appellees introduced several exhibits, some of which were by no stretch of the imagination referred to in any way in the Report of the Commission. For example, the Railroads introduced in exhibit form copies of documents from the Commission's files in Docket No. MC-200 (Sub-No. 63TA). There was never any reference either in documents filed by the Railroads or by appellant or in the Report of the Commission to Docket No. MC-200 (Sub-No. 63TA). These documents, however, were offered by the Railroads in support of the orders here involved.

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Consideration of appellant's two major contentions before the District Court concerning the merits of the orders here involved demonstrates that the certificate in Docket No. MC-200 (Sub-No. 46) was unnecessary to such review.

Appellant urged that the temporary operating authority in Docket No. MC-200 (Sub-No. 60TA) is equal in scope to the "grandfather" claims and certificates of appellant's predecessor, Monark Motor Freight System, Inc. Appellant pointed out that the single premise upon which the majority of the Commission based its finding was that the scope of the temporary operating authority to transport explosives issued to appellant, as the Commission found in 1942, was by its terms tied to the disposition of the "grandfather" claims of appellant's predecessor. Without such a premise the majority could not have concluded that, because points covered by the "grandfather" claims not eventually certificated are not "authorized" points for the transportation of general commodities, they are not "authorized" points for the transportation of explosives under the temporary operating authority. Appellant urged that the temporary operating authority was not tied to the disposition of the "grandfather" claims; that the reference to those claims and to the certificates acquired by appellant from Monark Motor Freight System, Inc., was solely for the purpose of delineating the territorial scope of the temporary authority at the time it was granted; that since appellant was entitled to conduct operations to the full extent of the "grandfather" claims at the time of the issuance of the temporary operating authority, the temporary operating authority was equal in scope to the "grandfather" claims as well as to the certificates. In support of its position, appellant cited the word "authorized" in the

authority,[13] urging that the use of the word showed that the grant was intended to cover both the scope of the "grandfather" claims and the certificates acquired by appellant from its predecessor. Appellant also urged that the finding that the temporary operating authority was tied to the disposition of the "grandfather" claims meant that the authority when granted was indefinite and uncertain, contrary to Section 210a(a) of the Interstate Commerce Act, 49 U. S. C. §310a(a). Appellant also noted that it was logically impossible to conclude, as the majority did, that the temporary operating authority held by appellant's predecessor was equal in scope to the temporary operating authority held by appellant in Docket No. MC-200 (Sub-No. 60TA), and then to have found that the scope of the temporary operating authority was limited to the certificate in Docket No. MC-200 (Sub-No. 46).[14]

Appellant also argued before the District Court that even if the temporary operating authority properly were limited to the points covered by the certificate issued in

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[13] Appellant's temporary operating authority in Docket No. MC-200 (Sub-No. 60TA) reads as follows:

> "*Dangerous Explosives,*
> To, from, and/or between points and places authorized to be served in connection with Docket Nos. MC 30077 and effective Sub Nos. thereunder which were acquired by Applicant herein."

[14] The temporary operating authority issued to appellant's predecessor, Monark Motor Freight System, Inc., read:

> "*Dangerous Explosives* . . .
> To, from, and/or between points and places now served by Applicant [Monark] as set forth in certificates issued by, and applications pending with this Commission, under MC 30077 and Sub Nos. 1 to 5 inclusive."

Since the "grandfather" claims of Monark were pending on an application with the Commission in Docket No. MC-30077 at the time of the issuance of that temporary operating authority, there could be no doubt that the authority granted covered the full scope of the "grandfather" claims.

Docket No. MC-200 (Sub-No. 46), the majority of the Commission failed to give any effect to the terms "to, from, and/or between points" in the terms of the authority. The majority, in the Appendix to its Report, specified the scope of appellant's temporary operating authority as construed, setting forth not only the same points but also the same restrictions provided for in the certificate in Docket No. MC-200 (Sub-No. 46). Thus, the Appendix to the Report prohibits service between many points which may be served, or prohibits service from a point although allowing service to the point, or prohibits service to a point although service is allowed from the point.

The certificate in Docket No. MC-200 (Sub-No. 46) clearly was unnecessary to the determination of appellant's contentions on the merits even assuming that the record in the proceeding before the Commission consisted solely of documents in files which were referred to by the Commission. Appellant has never urged, as the Commission notes in its motion to affirm, that the Appendix to the Report of the Commission does not properly set forth the points and the manner of service permitted by appellant's certificate in Docket No. MC-200 (Sub-No. 46). The Railroads in their motion to affirm state that all parties granted before the District Court that the certificate in Docket No. MC-200 (Sub-No. 46) was sufficiently before the Court to permit review. Only the United States in its motion urges otherwise. The cases cited by the United States are clearly not in point.

The District Court noted in its opinion that the majority of the Commission stated that its Appendix completely described the points and the manner of service covered by the certificate in Docket No. MC-200 (Sub-No. 46). The Court, however, stated:

> The statement in the Report that the Appendix follows the provisions of permanent Sub-No. 46 is not evidence here of that fact.

Under the District Court's theory of the proceeding in this case before the Commission, "an adequate hearing" was held because the Commission took official notice of documents it considered "pertinent and determinative" and identified these documents "in its Report and its Order of June 2, 1952." Under this theory appellant's only opportunity to rebut or explain apparently would be on judicial review. However, when the District Court came to the point where review on the merits was to be considered, it refused to review because irrelevant material was not in exhibit form before the District Court and refused to accept the uncontested statement in the Report of the Commission that the very document which the District Court deemed necessary for review was an Appendix to the Commission's Report. Appellant respectfully submits that even if the District Court's theory of administrative law is proper in this case, the District Court under its own theory and under the facts in this case was required to review these orders.

**D. The Orders Here Involved Empty Appellant's Operating Authority Of Significance.**

The Commission has repeatedly recognized in other cases that the need for the transportation of explosives is not the same as the need for transportation of commodities other than explosives. *Strickland Transportation Co., Inc., Extension—Dangerous Explosives*, 49 M.C.C. 595. The Commission also has recognized the special characteristics of the transportation of explosives and has promulgated regulations accordingly. See *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337.

By virtue of its construction of appellant's temporary operating authority in Docket No. MC-200 (Sub. No. 60TA) the Commission has restricted appellant's transportation of explosives to those points where commodities other than dangerous explosives normally move.

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Shippers and receivers of explosives are not normally situated in the large commercial centers to and from which commodities other than dangerous explosives generally move. The orders here involved, however, would restrict appellant's transportation of dangerous explosives generally to large commercial centers. The Commission's orders, therefore, would prohibit appellant from transporting explosives to and from most of the points in the territory covered by this authority where explosives would normally move. As appellant pointed out to the Commission in the documents filed by it with the Commission in this proceeding, the orders here involved would prohibit appellant from transporting explosives to and from many of the points concerning which the Department of Defense of the United States supported a need for permanent motor carrier service in Docket No. MC-200 (Sub.No. 84), which is appellant's pending application for permanent authority covering the temporary operating authority here involved.

## CONCLUSION AND REQUEST FOR EXTENSION OF STAY PENDING FINAL DISPOSITION OF THIS APPEAL

This case has been unique from the outset. For the first time, the Interstate Commerce Commission ordered a motor carrier to restrict its operations on the petition of competitors, without referring the issues for hearing to an examiner. Then, the District Court, denying that such orders could be issued without compliance with Section 204(c) of the Interstate Commerce Act, sustained the procedure on a novel theory of Section 204(c), of the Commission's General Rules of Practice, and of administrative law, but refused to review the findings on a technical and unfounded ground. Now, appellees, willing only to accept the ultimate conclusions of the Commission and

of the District Court, urge this Court to affirm on any of a multitude of grounds, some rejecting findings of the Commission and of the District Court, others new in this case. This case emphasizes the necessity for insistence upon observance of procedures established for such cases by the Interstate Commerce Act, the Administrative Procedure Act, and the Commission's General Rules of Practice. Sanctioning of deviation from such procedures can only result in the rampant confusion evidenced in this case, precluding the motor carrier from ever having an opportunity to demonstrate that the orders restricting its operations are unwarranted. Appellant respectfully submits that appellees' motions should be overruled.

Appellant respectfully requests that this Court extend the Order of the Court, dated August 31, 1953, staying judgment and the orders of the Commission here involved pending consideration and action by the Court on the jurisdictional statement, until final disposition of this appeal.

Respectfully submitted,

JOHN B. GAGE
A. ALVIS LAYNE, JR.
JOHN KREAMER
H. CHARLES EPHRAIM
*Counsel for Plaintiff-Appellant*

## APPENDIX A

# Interstate Commerce Commission

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No. MC-200 (Sub-No. 60-TA)

RISS & COMPANY, INC., INTERPRETATION OF TEMPORARY AUTHORITY

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Decided June 2, 1952

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Temporary authority in No. MC-200 (Sub-No. 60-TA) construed, and found to authorize the transportation of dangerous explosives only, from, to, between the points, over the routes, and in the manner in which Riss & Company, Inc., is authorized to transport other commodities as specified in its certificate in No. MC-200 (Sub-No. 46). Riss & Company, Inc., found to be conducting operations in excess of such authority. Cease and desist order entered.

Lewyn W. Wickes, James W. Nisbet, Francis J. Steinbrecker, and F. X. Masterson for petitioner.

A. Alvis Layne, Jr., and H. Charles Ephraim for repliant.

REPORT OF THE COMMISSION ON PETITION BY THE COMMISSION:

By petition, dated February 26, 1952, eastern railroads and class I railroads in western territory, hereafter called petitioners or the railroads, have tendered a petition in which they ask that Riss & Company, Inc., hereafter called Riss, be required to cease and desist from the perform-

ance of certain operations which they allege are being conducted beyond the scope of the temporary authority granted to Riss in No. MC-200 (Sub-No. 60-TA). In its reply to the petition, Riss asserts, in part, that the order sought by the railroads is improper relief to be sought by petition, and moves that the pleading be dismissed. We conclude that the petition which, in effect, seeks an interpretation as to the territorial extent of temporary authority granted in No. MC-200 (Sub-No. 60-TA), properly may be considered under rule 102 of our General Rules of Practice, and it is accepted for filing. The motion to dismiss is overruled. A brief review of the circumstances surrounding the issuance of the temporary authority will aid in understanding the issues raised in the petition and reply.

Riss holds temporary authority in No. MC-200 (Sub-No. 60-TA) to transport "dangerous explosives, to, from, and between points authorized to be served in connection with docket No. MC-30077 and effective subnumbers thereunder." No. MC-30077 was the docket number assigned to the application of Monark Motor Freight System, Inc., hereafter called Monark, filed under the so-called "grandfather" clause, section 206 (a) of the Interstate Commerce Act, which, along with the certificates in No. MC-30077 (Sub-No. 3) and No. MC-30077 (Sub-No. 4), was acquired by Riss pursuant to the order of September 28, 1942, in Riss & Co., Inc.—Purchase—Monark M. Freight System, Inc., 38 M.C.C. 563. No. MC-200 (Sub-No. 46) was assigned to the operations so acquired. Monark originally was granted temporary authority in 1942, prior to the transfer of its operating rights to Riss, to transport dangerous explosives to the same extent as that set forth in No. MC-200 (Sub-No. 60-TA). At that time Monark's "grandfather" application in No. MC-30077 was pending, and had not been resolved. It has since been finally determined, and Riss, as successor in interest to Monark,

was found entitled to continue certain operations as a common carrier by motor vehicle, of general commodities, except dangerous explosives among other exceptions, between specified points in a number of States, over regular routes, and of specified commodities, from, to, and between described points, over irregular routes. The territorial extent of these operations is far less than the "grandfather" rights claimed by Riss as successor in interest to Monark.

After various appeals to this Commission, as well as certain court action which it is not necessary to recite herein in order to dispose of the issues raised by the petition and reply, a certificate was issued in No. MC-200 (Sub-No. 46) authorizing such operations, and is now in full force and effect. During the entire period of adjudication of the claimed "grandfather" rights, and since then, with the exception of a few days, Riss has held continuing temporary authority to transport dangerous explosives to the same extent as set forth in No. MC-200 (Sub-No. 60-TA). The temporary authority is now conditioned to expire upon final determination of the application in No. MC-200 (Sub-No. 84), in which Riss seeks permanent authority to transport dangerous explosives.

The railroads in their petition recite that at the time of the issuance of the temporary authority, the Monark "grandfather" rights had not been determined; that the operating rights so acquired are now the subject of a certificate in No. MC-200 (Sub-No. 46); and that the right to transport dangerous explosives by Riss is limited to serving the same points and in the same manner Riss is authorized by the certificate in No. MC-200 (Sub-No. 46) to transport commodities other than dangerous explosives. The railroads claim that Riss, since the certificate in No. MC-200 (Sub-No. 46) has been in effect, is transporting dangerous explosives to and from points not authorized

to be served by the certificate in No. MC-200 (Sub-No. 46), particularly such points as Hingham, Mass., Edgewood, Md., and Radford, Va., to their financial detriment.

In its reply, Riss argues that the temporary authority in No. MC-200 (Sub-No. 60-TA) authorizes it to transport dangerous explosives from, to, and between all points which it claimed to serve as successor in interest to the Monark "grandfather" rights determined in No. MC-200 (Sub-No. 46) as well as between the points which it is authorized to serve by reason of the transfer to it of certain certificates held by Monark in subnumbered proceedings; and that the service which it may perform pursuant to the temporary authority should not contract upon the issuance of a certificate in No. MC-200 (Sub-No. 46), which it terms as unrelated to the need for the transportation of dangerous explosives. Riss contends rather that it may serve all points in the transportation of dangerous explosives which it could serve under the Monark certificates transferred to it, and in addition that it may serve all points which it claimed a right to serve in the Monark "grandfather" application. Riss urges further that the proper proceeding to test the railroad's claim as to the territorial scope of its temporary authority is in the No. MC-200 (Sub-No. 84) application for permanent authority to transport dangerous explosives, and that the issues raised by the railroads in their petition does not allow consideration by us of the importance of Riss' dangerous explosives operations to the Department of Defense.

At the outset, insofar as Riss succeeded in interest by the order in Riss & Co., Inc.—Purchase—Monark M. Freight System, Inc., supra, to the outstanding certificates issued to Monark, by the terms of its temporary authority and so long as it is in effect, it may transport dangerous explosives to the same extent that it is authorized to transport other commodities by the terms of such certificates.

Certificate No. MC-200 (Sub-No. 46) embraces both the authority finally determined in the "grandfather" application and the certificated authority held by Monark and transferred to Riss.

The principal issue before us, however, is whether Riss, under the terms of its temporary authority in No. MC-200 (Sub-No. 60-TA), may provide service on dangerous explosives to the same extent that it claimed operating rights in the Monark "grandfather" application, or whether Riss, since the issuance and effectiveness of certificate No. MC-200 (Sub-No. 46), is authorized to transport dangerous explosives only to the same extent as it may transport other commodities as evidenced by such certificate. In our opinion, the position taken by Riss in its reply is untenable. The temporary authority to transport dangerous explosives is related to the pending permanent application for authority to transport the same commodity, No. MC-200 (Sub-No. 84), only insofar as the expiration date of the temporary authority is concerned, and nothing more. There is no interrelation between the extent of the territory that may be served under the temporary authority and that sought in the permanent application to transport dangerous explosives. The temporary authority, insofar as territorial applicability is concerned, by its very terms, is directly tied to the points authorized to be served in No. MC-30077 (renumbered No. MC-200 (Sub-No. 46)). As noted, at the time of the issuance of the original temporary authority and pending the final determination of the Monark "grandfather" rights, the territory which Riss claimed it might serve exceeded that which Riss finally was found entitled to serve. Points served under color of claimed "grandfather" rights which Riss was later found not entitled to serve by reason of Riss and its predecessor in interest not having conducted bona fide operations on June 1, 1935, and continuously thereafter, are not in any conceivable

sense "authorized" points. They merely are points which Riss claimed it had a statutory right to serve, which it was allowed to serve during the various stages leading to the issuance and effectiveness of its No. MC-200 (Sub-No. 46) certificate, and with respect to which its claims were not substantiated.

As it finally has been determined that Riss is not authorized to serve certain points claimed in No. MC-200 (Sub-No. 46) in the transportation of other traffic, it necessarily must follow that it may not serve such points under the temporary authority in question. There has not been any diminution in the points Riss might serve under its temporary authority, but rather there was a resolution, coincidental with the final determination of No. MC-200 (Sub-No. 46), of the points which it is authorized to serve under such temporary authority. Any other conclusion would leave indefinite and uncertain the extent of the temporary authority that Riss has been granted, and would be administratively as well as logically unsound. The appendix herein details the extent of Riss' authority to transport dangerous explosives under No. MC-200 (Sub-No. 60-TA), from, to, and between the same points and in the same manner that it is authorized to transport other commodities as evidenced in certificate No. MC-200 (Sub-No. 46).

We do not consider the allegation that the importance of Riss' service to the Department of Defense has been ignored by the filing of the railroads' petition relevant to the issue herein. The transportation of dangerous explosives by Riss is authorized only to the extent indicated in the appendix. Any other service in the transportation of dangerous explosives is not authorized in No. MC-200 (Sub-No. 60-TA). If there is a need for additional transportation service, it may be met by the filing of further properly supported applications for temporary or per

manent authority. Moreover, the Department of Defense has not intervened herein, although aware of the filing of the railroads' petition.

As seen, petitioners allege that Riss has been performing service in the transportation of dangerous explosives at points not included in the appendix herein. Riss has not denied this allegation, but rather claims and, in effect, holds itself out to transport dangerous explosives to numerous points not embraced in the appendix. We, therefore, shall order a cessation of such unauthorized operations.

We find that the temporary authority issued to Riss & Company, Inc., in No. MC-200 (Sub-No. 60-TA), authorizes temporary operations in interstate or foreign commerce, as a common carrier by motor vehicle, of dangerous explosives from, to, and between the points, and in the manner set forth in the appendix herein. An order will be entered requiring Riss & Company, Inc., to cease and desist from any operations under No. MC-200 (Sub-No. 60-TA) in excess of those set forth in the appendix.

MAHAFFIE, Commissioner, dissenting:

I would deny the petition. Applicant's temporary authority was by an order dated September 30, 1947, continued so as to expire upon final determination of its application for permanent operating rights in No. MC-200 (Sub-No. 84). No. MC-200 (Sub-No. 84) has been heard at length. In the meantime, extensive operations under the outstanding temporary authority are being conducted. We may find that they should be continued or be curtailed. But until we do on the basis of the record now available to us we should not grant such a petition as this, unless it is required by law. As to the law applicable in the circumstances, I think the provisions of section 9 (b) of the Administrative Procedure Act on which the present order is based may still be considered controlling.

I am authorized to say that COMMISSIONERS LEE and KNUDSON join in this dissent.

COMMISSIONER PATTERSON was necessarily absent and did not participate in the disposition of this proceeding.

## APPENDIX

Regular routes:

Dangerous explosives:

Between Kansas City, Mo., and New York, N. Y.: From Kansas City over U. S. Highway 40 to Kingdom City, Mo., thence over U. S. Highway 54 to its junction with U. S. Highway 36, near Pittsfield, Ill., thence over U. S. Highway 36 through Springfield, Ill., to Decatur, Ill., thence over Illinois Highway 48 to Onarga, Ill., thence over U. S. Highway 45 to Gilman, Ill., thence over U. S. Highway 24 to Fort Wayne, Ind., thence over U. S. Highway 30 through Van Wert, Ohio, to Delphos, Ohio, thence over U. S. Highway 30-N to Mansfield, Ohio, thence over U. S. Highway 42 to Cleveland, Ohio, thence over Ohio Highway 84 to Ashtabula, Ohio, thence over U. S. Highway 20 to its junction with U. S. Highway 62, thence over U. S. Highway 62 to its junction with New York Highway 5, near Buffalo, N. Y., thence over New York Highway 5 to Albany, N. Y., thence over U. S. Highway 9-W to Fort Lee, N. J., and thence across the George Washington Bridge to New York. Service is authorized to and from the intermediate points of Columbia, Mo., Springfield, Ill., Fort Wayne, Ind., Mansfield, Ashland, and Cleveland, Ohio, Erie, Pa., and Fredonia, Buffalo, Geneva, Syracuse, Utica, Schenectady, and Albany, N. Y., and the off-route point of Painesville, Ohio.

Between Albany, N. Y., and New York, N. Y.: From Albany over U. S. Highway 9 to New York. Service is authorized to and from the intermediate point of Yonkers, N. Y.

Between Kingdom City, Mo., and New York, N. Y.: From Kingdom City over U. S. Highway 40 through St. Louis, Mo., and Indianapolis, Ind., to Bridge-

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port, Ohio, thence over Ohio Highway 7 through Martins Ferry, Ohio, to its junction with U. S. Highway 22, near Steubenville, Ohio, thence over U. S. Highway 22 through Pittsburgh, Ebensburg, and Harrisburg, Pa., to Newark, N. J., thence over city streets and connecting highways to New York. Service is authorized to and from the intermediate point of St. Louis, Mo., East St. Louis, Ill., Terre Haute, Indianapolis, and Richmond, Ind., Springfield, Columbus, Martins Ferry, and Steubenville, Ohio, Pittsburgh and Harrisburg, Pa., and Newark and Jersey City, N. J., and the off-route points of McKees Rocks, Pa., and Hoboken and Passaic, N. J., with no service to or from Kingdom City.

Between Kansas City, Mo., and Pittsfield, Ill.: From Kansas City over U. S. Highway Alternate 69 to its junction with U. S. Highway 69, thence over U. S. Highway 69 to Cameron, Mo., and thence over U. S. Highway 36 through Macon, Mo., to Pittsfield. Service is authorized to and from the intermediate point of Hannibal, Mo., with no service to or from Pittsfield.

Between Springfield, Ill., and Chicago, Ill.: From Springfield over U. S. Highway 66 through Chenoa, Ill., to Chicago, Ill. Service is authorized to and from the intermediate point of Bloomington, Ill., and the off-route point of Joliet, Ill.

Between Kansas City, Mo., and Cameron, Mo.: From Kansas City over U. S. Highway Alternate 169 to its junction with U. S. Highway 169, thence over U. S. Highway 169 to St. Joseph, Mo., thence over U. S. Highway 36 to Cameron. Service is authorized to and from the intermediate point of St. Joseph, Mo., with no service to or from Cameron.

Between Kansas City, Mo., and Chenoa, Ill.: From Kansas City over U. S. Highway 24 through Peoria, Ill., to Chenoa. Service is authorized to and from the intermediate point of Peoria, Ill., and off-route point of Pekin, Ill., with no service to or from Chenoa.

Between Indianapolis, Ind., and Cincinnati, Ohio: From Indianapolis over U. S. Highway 52 to Cincinnati. Service is not authorized to or from intermediate points.

Between Kansas City, Mo., and Cincinnati, Ohio: From Kansas City over U. S. Highway 50 through Seymour, Ind., to Cincinnati. Service is authorized to and from the intermediate points of Sedalia and St. Louis, Mo., East St. Louis, Ill., and Lawrenceburg, Ind.

Between Harrisburg, Pa., and Philadelphia, Pa.: From Harrisburg over U. S. Highway 230 to Lancaster, Pa., thence over U. S. Highway 30 to Philadelphia. Service is not authorized to or from intermediate points.

Between Kansas City, Mo., and Omaha, Nebr.: From Kansas City over U. S. Highway 71 to its junction with U. S. Highway 275 near Savannah, Mo., thence over U. S. Highway 275 through Glenwood, Iowa, to junction Iowa Highway 375, thence over Iowa Highway 375 to Council Bluffs, Iowa, thence over U. S. Highway 6 to Omaha. Service is authorized to and from the intermediate points of St. Joseph and Rockport, Mo., and Council Bluffs, Iowa, and the off-route point of South Omaha, Nebr.

Between Glenwood, Iowa, and Peoria, Ill.: From Glenwood over U. S. Highway 34 to Galesburg, Ill., thence over U. S. Highway 150 to Peoria. Service is not authorized to or from intermediate points or Glenwood.

Between Chenoa, Ill., and Gilman, Ill.: From Chenoa over U. S. Highway 24 to Gilman. Service is not authorized to or from the termini or intermediate points.

Between Van Wert, Ohio, and Lodi, Ohio: From Van Wert over U. S. Highway 224 to Lodi. Service is not authorized to or from the termini or intermediate points.

Between Council Bluffs, Iowa, and Chicago, Ill.: From Council Bluffs over U. S. Highway 6 to Princeton, Ill., thence over U. S. Highway 34 to Chicago. Service is authorized to and from the intermediate points of Des Moines and Davenport, Iowa.

Between Chicago, Ill., and Cleveland, Ohio: From Chicago over U. S. Highway 20 and U. S. Highway B. R. 20 to Toledo, Ohio; thence over U. S. Highway 23 to its junction with U. S. Highway 6; thence over U. S. Highway 6 to Vermilion, Ohio; thence over Ohio Highway 60 to Birmingham, Ohio; thence over Ohio Highway 113 to Elyria, Ohio; thence over Ohio Highway 57 to its junction with Ohio Highway 254; thence over Ohio Highway 254 to Cleveland. Service is authorized to and from the intermediate point of Toledo, Ohio.

Between Chicago, Ill., and Fort Wayne, Ind.: From Chicago over U. S. Highway 41 to its junction with U. S. Highway 30 near Dyer, Ind.; thence over U. S. Highway 30 to Fort Wayne. Service is not authorized to or from intermediate points.

Between Lodi, Ohio, and Ebensburg, Pa.: From Lodi over U. S. Highway 224 to New Castle, Pa.; thence over U. S. Highway 422 to Ebensburg. Service is authorized to and from the intermediate point of Akron, Ohio. Service is not authorized to or from the termini.

Between Philadelphia, Pa., and Newark, N. J.: From Philadelphia over U. S. Highway 1 to Newark. Service is authorized to and from the intermediate points of Elizabeth, Trenton, Newark, and Jersey City, N. J., and the off-route points of Passaic and Hoboken, N. J.

Between Chicago, Ill., and junction U. S. Highways 41 and 30: From Chicago over U. S. Highway 330 to its junction with U. S. Highway 30; thence over U. S. Highway 30 to its junction with U. S. Highway 41 near Dyer, Ind. Service is not authorized to or from the intermediate points or the named junction.

Between Mansfield, Ohio, and Lancaster, Pa.: From Mansfield over U. S. Highway 30 to Lancaster. Service is authorized to and from the intermediate point of Pittsburg, Pa., with no service to or from Lancaster.

Between Albany, N. Y., and Boston, Mass.: From Albany over U. S. Highway 20 to Boston. Service is

authorized to and from the intermediate point of Springfield, Mass.

Between Louisville, Ky., and Indianapolis, Ind.: From Louisville over U. S. Highways 31E and 31 to junction with U. S. Highway 50; thence over U. S. Highway 50 to Seymour, Ind.; thence over U. S. Highway Alternate 31 to junction U. S. Highway 31; thence over U. S. Highway 31 to Indianapolis. Service is not authorized to or from intermediate points.

Between Irwin Tollgate at the junction of U. S. Highway 30 and the Pennsylvania Turnpike, and Harrisburg, Pa., (as an alternate route): from Irwin Tollgate over the Pennsylvania Turnpike to the Middlesex Tollgate, and thence over U. S. Highway 11 to Harrisburg. Service is not authorized to or from intermediate points.

Return over these routes.

Service is authorized to and from points in the Chicago, Ill., commercial zone as defined in Chicago, Ill., Commercial Zone, 1 M.C.C. 673, as intermediate and off-route points in connection with the above authorized regular-route operations.

Service is authorized over any combination of the above-described routes regardless of whether the routes joined have a common point of service.

Restriction: No service is authorized between Philadelphia and New York City or between Elizabeth, Trenton, Newark, Jersey City, and Passaic, on the one hand, and Philadelphia and New York City on the other.

No service is authorized between Boston, on the one hand, and New York City, Jersey City, Newark, Elizabeth, Passaic, Trenton and Philadelphia, on the other.

Dangerous explosives, over regular routes, in connection with said carrier's authorized regular routes, regardless of whether the routes used in combination have a common authorized point of service.

Between Decatur, Ill., and Indianapolis, Ind.: From Decatur over U. S. Highway 36 to Indianapolis. Service is not authorized to or from Decatur or the intermediate points.

Between Shoals, Ind., and Louisville, Ky.: From Shoals over U. S. Highway 150 to Louisville. Service is not authorized to or from Shoals or the intermediate points.

Between Indianapolis, Ind., and junction U. S. Highways 52 and 24 (near Kentland, Ind.): From Indianapolis over U. S. Highway 52 to junction U. S. Highway 24. Service is not authorized to or from the described junction or the intermediate points.

Between Cincinnati, Ohio, and Zanesville, Ohio: From Cincinnati over U. S. Highway 22 to Zanesville. Service is not authorized to or from Zanesville or the intermediate points.

Between Fort Wayne, Ind., and Toledo, Ohio: From Fort Wayne over U. S. Highway 24 to Toledo. Service is not authorized (1) over this route between Toledo, on the one hand, and, on the other, points east of the Illinois-Indiana State line, (2) to or from intermediate points.

Between Cleveland, Ohio, and Deerfield, Ohio: From Cleveland over Ohio Highway 14 to Deerfield. Service is not authorized to or from Deerfield, or the intermediate points.

Between New York, N. Y., and Springfield, Mass.: From New York over U. S. Highway 1 to New Haven, Conn., and thence over U. S. Highway 5 to Springfield. Service is not authorized to or from intermediate points. Return over these routes.

Dangerous Explosives:

Between Pittsburgh, Pa., and Detroit, Mich.: From Pittsburgh, Pa., over U. S. Highway 22 to Zanesville, Ohio, thence over U. S. Highway 40 to Columbus, Ohio, thence over U. S. Highway 33 to Marysville, Ohio, thence over Ohio Highway 31 to Kenton, Ohio, thence over U. S. Highway 68 to Toledo, Ohio, and

thence over U. S. Highway 24 to Detroit, Mich., and return over the same route. Service is authorized to and from the intermediate points of Zanesville, Toledo, and Columbus, Ohio; and the off-route points of Lancaster, Dayton, and Springfield, Ohio.

Between Charleston, W. Va., and Nitro, W. Va.: From Charleston over U. S. Highway 35 to Nitro, and return over the same route.

Between Charleston, W. Va., and Huntington, W. Va.: From Charleston over U. S. Highway 60 to Huntington, and return over the same route. Service is authorized to and from the off-route points of Kenova, Ceredo, and Owens, W. Va.

Between Clarksburg, W. Va., and Marietta, Ohio, as follows: From Clarksburg over U. S. Highway 50 to Parkersburg, W. Va., thence over U. S. Highway 21 to Marietta. From Clarksburg over U. S. Highway 50 to Belpre, Ohio, thence over Ohio Highway 7 to Marietta; and return over these routes to Clarksburg.

Service is authorized to and from the off-route points of Harrisville, Big Springs, Washburn, Mahone, Mount Zion, Grantsville, Cairo, and Smithville, W. Va.

Between Clarksburg, W. Va., and Charleston, W. Va: From Clarksburg over U. S. Highway 19 to Weston, W. Va., thence over U. S. Highway 119 via Clendenin, W. Va., to Charleston. From Clarksburg over U. S. Highway 19 to Sutton, W. Va., thence over West Virginia Highway 4 to Clendenin, W. Va., and thence to Charleston, as specified above; and return over these routes to Clarksburg.

Service is authorized to and from the off-route points of San Fork, Lost Creek, Burnsville, West Milford, Gilmer Station, McWhorter, Clay, and Crawford, W. Va.

Between Clarksburg, W. Va., and Pittsburgh, Pa.: From Clarksburg over U. S. Highway 19 to junction Bethel Road, thence over Bethel Road to Junction Pennsylvania Highway 88, thence over Pennsylvania Highway 88 to Overbrook, Pa.; and thence over Pennsylvania Highway 51 to Pittsburgh, and return

over the same route. Service is authorized to and from the off-route points of Coraopolis and McKees Rocks, Pa.

Between Morgantown, W. Va., and Pittsburgh, Pa., as follows: From Morgantown over U. S. Highway 119 to Uniontown, Pa., thence over Pennsylvania Highway 51 to junction Pennsylvania Highway 711, thence over Pennsylvania Highway 711 to Fayette City, Pa., thence over Pennsylvania Highway 906 via Milesville and Elizabeth, Pa., to East McKeesport, Pa., thence over U. S. Highway 30 to Pittsburgh. From Morgantown to Milesville as specified above, thence over Pennsylvania Highway 31 to junction Pennsylvania Highway 51, thence over Pennsylvania Highway 51 to Elizabeth, thence across the Monongahela River to West Elizabeth, Pa., thence over Pennsylvania Highway 837 to Pittsburgh; and return over these routes to Morgantown.

Between Uniontown, Pa., and Greensburg, Pa.: From Uniontown over U. S. Highway 119 to Greensburg, and return over the same route.

Between Clarksburg, W. Va., and Wheeling, W. Va., as follows: From Clarksburg over U. S. Highway 19 to Fairmont, then over U. S. Highway 250 to Wheeling. From Clarksburg over U. S. Highway 19 to junction West Virginia Highway 7, thence over West Virginia Highway 7 to Blacksville, W. Va., thence over West Virginia Highway 218 to the West Virginia-Pennsylvania State line, thence over Pennsylvania Highway 218 to Waynesburg, Pa., thence over U. S. Highway 19 to Washington, Pa., and thence over U. S. Highway 40 to Wheeling; and

Return over these routes to Clarksburg. Service is authorized to and from the off-route points of Grant Town, Brady, Dakota, Lumberport, Fairview, Star City, Lowesville, Everettsville, Booth, Arnettsville, Pursglove, National and Carolina, W. Va.

Between Clarksburg, W. Va., and French Creek, W. Va.: From Clarksburg over West Virginia Highway 20 to French Creek, and return over the same route.

Between Clarksburg, W. Va., and Elkins, W. Va.: From Clarksburg over West Virginia Highway 20 to Hodgesville, W. Va., thence over U. S. Highway 119 to Philippi, W. Va., and thence over U. S. Highway 250 to Elkins, and return over the same route. Service is authorized to and from the off-route points of Volga, Coalton, Century, Norton, and Meriden, W. Va.

Between Clarksburg and Grafton, W. Va.: From Clarksburg over U. S. Highway 50 to junction West Virginia Highway 77, thence over West Virginia Highway 77 to junction U. S. Highway 250, thence over U. S. Highway 250 to Philippi, W. Va., and thence over U. S. Highway 250 to Grafton, and return over the same route. Service is authorized to and from the off-route points of Brownton and Wendel, W. Va.

Between Clarksburg, W. Va., and Kingwood, W. Va., as follows:

From Clarksburg, over U. S. Highway 50 to Fellowsville, W. Va., thence over West Virginia Highway 26 to Kingswood.

From Clarksburg to Fellowsville as specified above, thence over West Virginia Highway 26 to junction unnumbered highway, and thence over unnumbered highway to Kingwood; and

Return over these routes to Clarksburg. Service is authorized to and from the off-route points of Newburgh, Independence, and Camp Dawson, W. Va.

Between Morgantown, W. Va., and Red House, Md.: From Morgantown over West Virginia Highway 7 to the West Virginia-Maryland State line, thence over Maryland Highway 39 to Oakland, Md., and thence over U. S. Highway 219 to Red House, and return over the same route. Service is authorized to and from the off-route points of Deer Park and Mountain Lake Park, Md.

Between Newcreek, W. Va., and Cumberland, Md.: From Newcreek over U. S. Highway 220 to Cumberland, and return over the same route. Service is authorized to and from the off-route point of Piedmont, W. Va.

Between Pittsburgh, Pa., and Charleston, W. Va.: From Pittsburgh over U. S. Highway 19 to Washington, Pa., thence over U. S. Highway 40 to Wheeling, W. Va., thence over West Virginia Highway 2 to Parkersburg, W. Va., and thence over U. S. Highway 21 to Charleston, and return over the same route.

Service is authorized to and from the off-route points of Ravenswood and Elizabeth, W. Va., and points on West Virginia Highway 2 between Weirton and Wheeling, W. Va.

Service is authorized to and from all intermediate points on the above-specified routes.

Between Charleston and Clarksburg, W. Va., and Baltimore, Md., as follows: From Charleston over U. S. Highway 60 to Lexington, Va., thence over U. S. Highway 11 to Winchester, Va., thence over U. S. Highway 50 to Washington, D. C. and thence over U. S. Highway 1 to Baltimore.

From Clarksburg over U. S. Highway 50 to Washington, D. C., thence over U. S. Highway 1 to Baltimore; and

Return over these routes to Charleston and Clarksburg.

Service is authorized to and from all intermediate points in West Virginia and the off-route points of Ronceverte, Montgomery, Cabin Creek, Rowlesburg, Elk Garden, Blaine, and Manheim, W. Va., without restriction; the intermediate points of Winchester and Rosslyn, Va., for traffic other than that moving from points in Maryland, Virginia, and the District of Columbia, and the off-route points of Luray and Alexandria, Va., for traffic other than to or from points in Maryland and Virginia; and Beltsville, College Park, and Hyattsville, Md., restricted to traffic moving to or from points in West Virginia.

Between Hagerstown, Md., and Winchester, Va.: From Hagerstown over U. S. Highway 11 to Winchester, and return over the same route. Service is not authorized between termini or to or from intermediate points.

Between Martinsburg, W. Va., and Charlestown, W. Va.: From Martinsburg over West Virginia Highway 9 to Charlestown, and return over the same route. Service is not authorized between termini or to or from intermediate points.

Between Pittsburgh, Pa., and Baltimore, Md.: From Pittsburgh over U. S. Highway 30 to McConnellsburg, Pa., thence over Pennsylvania Highway 16 to the Pennsylvania-Maryland State line, thence over Maryland Highway 32 to Westminster, Md., and thence over U. S. Highway 140 to Baltimore, and return over the same route. Service is authorized to and from the intermediate and off-route points of Greensburg, Jeanette, Monessen, Fayette City, Charleroi, and McKeesport, Pa.

Between Wheeling, W. Va., and Washington, D. C.: From Wheeling over U. S. Highway 40 to Frederick, Md., thence over U. S. Highway 240 to Washington, and return over the same route. Service is authorized to and from intermediate points, as follows: Washington, D. C. restricted to traffic moving to or from points other than those in Maryland; all other intermediate points without restriction; and the off-route points of Bellaire, Martin's Ferry, Yorkville, and Steubenville, Ohio.

Between Winchester, Va., and Baltimore, Md.: From Winchester over U. S. Highway 340 to Frederick, Md., thence over U. S. Highway 40 to Baltimore, and return over the same route.

Service is not authorized between termini.

Service is authorized to and from all intermediate points restricted to traffic moving to or from points in West Virginia, Ohio, or Pennsylvania.

Between Luray, Va., and Washington, D. C.: From Luray over U. S. Highway 211 to Washington, and return over the same route. Service is not authorized between termini or to or from intermediate points.

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Between Pike, W. Va., and Marietta, Ohio: From Pike over Alternate U. S. Highway 50 to Marietta, and return over the same route. Service is not authorized to or from intermediate points.

Between Grafton, W. Va., and Morgantown, W. Va.: From Grafton over U. S. Highway 119 to Morgantown, and return over the same route. Service is not authorized to or from intermediate points.

Between Pittsburgh, Pa., and Ford City, Pa.: From Pittsburgh over Pennsylvania Highway 28 to junction Pennsylvania Highway 128, thence over Pennsylvania Highway 128 to Ford City, and return over the same route. Service is authorized to and from the intermediate points of Creighton and Brackenridge, Pa.

Between Greensburg, Pa., and Brackenridge, Pa.: From Greensburg, Pa., over Pennsylvania Highway 66 to junction Pennsylvania Highway 366, thence over Pennsylvania Highway 366 to New Kensington, Pa., thence across the Allegheny River to junction Pennsylvania Highway 28, and thence over Penasylvania Highway 28 to Brackenridge, and return over the same route.

Service is not authorized to or from intermediate points.

Irregular routes:

Dangerous explosives:

From Fairfax, Kans., to all points and places in Iowa, Illinois, Indiana, Ohio, New York, New Jersey, and Pennsylvania.

From Norwalk and South Norwalk, Conn., and Gloucester, Mass., to Kansas City and St. Louis, Mo., and Chicago, Ill.

From Omaha, and Falls City, Nebr., Council Bluffs, Harlan, and Des Moines, Iowa, Chicago, Ill., from points and places in Missouri on and south of U. S. Highway 24 and on and west of U. S. Highway 65, and from points and places in Kansas on, east, and north of a line beginning at the Kansas-Nebraska State line, and extending along U. S. Highway 77 to Riley, Kans., thence along U. S. Highway 24 to

Topeka, Kans., thence along U. S. Highway 75 to Yates Center, Kans., and thence along U. S. Highway 54 to the Kansas-Missouri State line, to Louisville, Ky., and to points and places in Illinois, Ohio, Pennsylvania, New York, New Jersey, Connecticut, and Massachusetts, on the regular routes shown above.

Return with no transportation for compensation except as otherwise authorized.

Restriction: The above-specified commodity may not be transported to or from points on the regular routes authorized above.

Dangerous explosives, in truckload lots:

Between Washington, D. C., on the one hand, and, on the other, points and places in West Virginia, traversing Virginia and Maryland for operating convenience only.

From Clarksburg, Charlestown, and Bluefield, W. Va., to points and places in West Virginia, with no transportation for compensation on return except as otherwise authorized.

The authority granted herein and that previously granted said carrier to the extent they duplicate, shall not be construed as conferring more than one operating right. Any repetition in the statement of authority granted shall not be construed as conferring duplicate operating rights.

# In the Supreme Court of the United States

OCTOBER TERM, 1953

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No. 386

RISS AND COMPANY, INC., APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

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## MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee United States of America moves that the judgment of the district court be affirmed.

This is a direct appeal, pursuant to 28 U.S.C. 1253, from the final judgment entered on May 7, 1953,[1] by a specially constituted three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission. Appeal was allowed on August 24, 1953. The appeal papers were served

[1] On July 7, 1953, the district court denied appellant's motion for a new trial. The opinion of the district court is unreported, but a copy thereof is attached to appellant's Statement as to Jurisdiction.

by mail on August 26, 1953 and received on August 27, 1953.

The order of the Commission, here attacked, required appellant to limit its transportation of explosives to the points determined by the Commission to fall within the scope of its temporary authority.

Appellant's temporary authority to engage in the transportation of explosives was issued (under Docket No. MC-200 (Sub-No. 60-TA)) to it on April 15, 1946, pursuant to the provisions of section 210(a) of the Interstate Commerce Act, 49 U.S.C. 310(a),[2] The permit[3] in terms authorized appellant to transport explosives

> to, from, and/or between points and places authorized to be served in connection with Docket Nos. MC-30077 and effective sub-

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[2] Section 210 (a) of the Interstate Commerce Act, as amended, reads in part as follows:

> "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier . . ."

[3] As shown in the opinion of the district court, this permit was the last of a series of similar permits issued for successive periods of time by the Commission since the initial filing for such temporary authority by appellant's predecessor in interest in 1942. The authority, as set forth in the existing permit, is continued in effect pending the Commission's determination of an application for permanent authority embracing such rights and others filed by the appellant.

numbers thereunder which were acquired by appellant herein.[4]

The proceeding leading to the issuance of the Commission's order of June 2, 1952, was instituted by the Commission as a result of a petition filed by certain Class I railroads, in which it was requested that the Commission require the appellant to discontinue operations alleged in said petition to be beyond the scope of appellant's temporary authority. Said petition was filed with the Commission on February 26, 1952, and served on the appellant on the same date. On April 1, 1952, appellant, after obtaining from the Commission an extension of time in which to reply to the petition, filed its answer incorporating a motion to dismiss. In that pleading appellant argued in some detail that the Commission was without authority to issue the order as requested by the railroad petitioners, and set forth other reasons why it believed that the petition should not be granted. Thereafter, upon consideration of the railroads' petition and the appellant's answer, the Commission issued the above-described order of June 2, 1952. On July 1, 1952, appellant filed a petition for reconsideration in which it set forth additional arguments why it believed the June 2 order was erroneous. This petition was denied on July 14, 1953.

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[4] The docket numbers here stated covered the "grandfather" application for general-commodity authority filed by appellant's predecessor in interest. After the purchase of such rights by the appellant, the proceeding was described as Docket No. MC-200 (Sub-No. 46).

It is submitted that this appeal presents no substantial question. In its Statement as to Jurisdiction, appellant urges that the Commission's order fails to comply with the requirements of section 204(c) of the Interstate Commerce Act, as amended, 49 U.S.C. 304(c),[5] in that notice and hearing, as required by that section, were not provided. The district court found to the contrary. Specifically, as to notice, it found that the record before it showed

> * * * service on Riss [the appellant] of a copy of the Railroads' petition on February 26, 1952 (Exh. 20, p. 117). Riss sought and obtained extension of time, until April 1, to answer (Exh. 20, p. 184). Riss filed answer and motion to dismiss on April 1 (Exh. 20, p. 89). There is no merit in the contention that Riss did not have proper and sufficient notice.

In support of its contention that it was not afforded an adequate hearing, appellant complains (Statement as to Jurisdiction, pp. 10, 11) that it

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[5] Section 204 (c) provides that "Upon complaint in writing to the Commission * * * or upon its own initiative without complaint, the Commission may investigate whether any motor carrier * * * has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier * * * has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier * * * to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

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was not given the opportunity to cross-examine witnesses, to inspect materials relied upon by the railroads, and to offer its own evidence in rebuttal or explanation. However, as the record will disclose, the railroads offered no testimony or witnesses, and there was nothing of a factual nature for the appellant to rebut or explain. The right to a full and fair hearing does not include the right to challenge or rely on evidence not offered or considered, or relevant to the inquiry. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575.

As the Commission and district court opinions point out, the sole issue raised by the pleadings was one of interpretation—the meaning of the language contained in appellant's temporary authority. The temporary authority (Sub-No. 60-TA), as indicated above, is to serve points set out in appellant's certificate authorizing the carriage of general commodities (Sub-No. 46). At the time the petition in the instant case was filed, the Commission's order fixing the limits of appellant's general-commodity authority had become final. That order had been attacked by this same appellant as giving it too limited authority, but had been ultimately sustained by a decision of the Supreme Court. *Riss & Co., Inc.* v. *United States, et al.*, 342 U.S. 937, affirming 100 F. Supp. 468 (W.D. Mo.). Accordingly, in the instant proceeding, the Commission was in a position to specify the points covered by the temporary authority by resort to its own records.

In these circumstances, it is plain that there was no factual issue requiring the taking of evidence. The matter was susceptible of determination upon consideration of the permit itself and the relevant prior orders of the Commission. As the district court opinion states, the reports and orders which formed the basis of the Commission's decision had been specifically identified in the pleadings. Indeed, appellant's own petition for reconsideration filed with the Commission (Pet. for Recon., p. 7) conceded that the issue was "of course solely a question of law." That being so, obviously there was no occasion or necessity to take evidence.[6]

As an additional point, appellant contends that the district court erred in refusing to review the Commission's holdings concerning the scope of its authority. The court refused only to rule on one contention advanced by appellant—the claim that the order of June 2, 1952, rather than limiting appellant to the scope of its rights as set forth in its certificate in Sub-No. 46, required it to operate in

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[6] The district court believed that there was also involved the subordinate question whether appellant was contemporaneously exceeding the scope of its lawful temporary authority. The court noted, in this connection that statements in the appellant's pleadings implicitly admitted an operation going beyond that found lawful by the Commission. While we believe the court was correct in its interpretation of the pleadings, we do not believe that there is a real issue on this point. The Commission's order did not purport to assess penalties or collect fines for unlawful operations conducted in the past. It merely required that appellant discontinue, in the future, operations found by the Commission to be beyond the scope of the temporary permit.

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a more restricted manner. In refusing to rule on this contention, the district court held that appellant's failure to submit its certificate in Sub-No. 46 precluded the court from comparing the scope of the rights there set forth with those set forth in the appendix to the Sub-No. 60TA proceeding. In thus ruling, the court was simply reiterating the well-established principle that it cannot rule on contentions challenging the validity of a Commission order in the absence of presentation of all of the relevant materials upon which it was based. See *Lubetich* v. *United States,* 315 U.S. 57, 58; *Mississippi Valley Barge Line* v. *United States,* 292 U.S. 282, 286.

CONCLUSION

For the foregoing reasons, it is submitted the appeal presents no substantial question and that the judgment of the district court should be affirmed.

ROBERT L. STERN,
*Acting Solicitor General.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1953

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No. 386

RISS & COMPANY, INC., APPELLANT

*v.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

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**MOTION TO AFFIRM**

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee, the Interstate Commerce Commission, moves that the judgment of the District Court in the above action be affirmed.

This is a direct appeal from a final decree dismissing appellant's complaint, entered May 7, 1953, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325. Plaintiff filed a motion for new trial on May 15, 1953, which was denied by order of the District Court on July 7, 1953. Petition for appeal was filed by plaintiff on August 24, 1953, and allowed by order of the District Judge on the same day. The



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District Court complaint was filed July 18, 1952, heard by the three-judge Court on November 12, 1952, final decree entered May 7, 1953, motion for new trial filed May 15, 1953, motion denied July 7, 1953, motion for injunction pending appeal filed and served by mail at Kansas City, Missouri, on July 11, 1953 (Saturday), after oral argument, order for injunction was issued by the three-judge Court, on July 16, 1953, to expire August 31, 1953, unless sooner terminated by this Court, and petition for appeal filed and allowed August 24, 1953.

The complaint sought to set aside an order of the Commission, entered June 2, 1952, requiring plaintiff to cease and desist from operations under temporary authority issued to Riss & Company, Inc., in No. MC-200 (Sub-No. 60 TA). The said operating authority was interpreted to consist of the regular and irregular routes, points and places, and territorial scope as fully stated in said Appendix. The Commission report held that operations not embraced in the said appendix were not included and embraced in the grant of authority in the (Sub-No. 60 TA) proceeding, and as such were unauthorized.

The basic question here presented is, what was the scope of the temporary authority granted to Riss & Company, Inc., by the order in No. MC-200 (Sub-No. 60 TA) entered April 16, 1946. Subordinate questions relate to Commission authority to interpret that grant of temporary

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authority, to notice and hearing required by law, to what if any authority was continued by reason of the application for permanent authority, under Section 9 (b) of the Administrative Procedure Act, 5 U. S. C., Sec. 1008 (b), to what extent, if any, the authority was restricted or changed by the report and order herein, and to the interpretation of the authority as more fully stated in the Commission report of June 2, 1952, 54 M. C. C. 531, and restated in the opinion of the Court below, and to court determination upon the merits. These are the principal questions raised by appellant's jurisdictional statement.

The questions in this appeal relate only to temporary authority granted appellant, the interpretation thereof, and the procedure in making that determination. It does not relate to any other motor carrier, or in its effect, deny or refuse to authorize service needed by the Defense Department. The interpretation and procedure relate solely to interpreting the temporary certificate issued to appellant in MC–200 (Sub-No. 60 TA), and determination of the territorial limits therein prescribed. It does not relate to or affect any other operating authority of appellant. The report involved, page 534, suggests that, if there is a need for additional service, it may be met by filing further applications for temporary or permanent authority. For reasons herein stated, the claim of appellant, jurisdictional statement page 7, that issues presented

are of importance to the entire motor carrier industry, is without merit.

The jurisdictional statement of statutes involved, page 2, omits the most important statute here involved, Section 210a, 49 U. S. C. 210a, and other statutes considered by the Commission and Court below, viz., Section 204 (a) (6), and Section 222 (a) (b), 49 U. S. C. 304 (a) (6), and 322 (a) (b). Therefore such omitted statutes are quoted in the appendix hereto.

**What was the scope of the temporary authority here involved?**

The application of Riss & Company, filed March 1, 1946, in the proceeding No. MC–200 (Sub–No. 60 TA) was for temporary authority, under provisions of Section 210a of the Interstate Commerce Act, 49 U. S. C. sec. 310a, to transport, in the exact words of the application as quoted in the opinion of the Court below, page 23, "Explosives and U. S. Army Ordnance Stores" over "regular" routes "between points named in I. C. C. Order of February 3, 1945 in * * * MC–200, Sub 46 (formerly Monark Motor Freight System Docket MC 30077)," until June 30, 1946 (Exh. 13). The certificate was granted April 15, 1946 until June 30, 1946 for transportation of *"Dangerous Explosives,* To, from and/or between points and places authorized to be served in connection with Docket Nos. 30077 and effective sub-numbers thereunder which were acquired by applicant herein" (Exh. 16). More than a year

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previously the Commission had on February 3, 1945, decided and specifically described the "grandfather" authority of Riss & Company, under MC–200, Sub 46 (as stated in the application "formerly Monark Motor Freight System Docket MC 30077)." The language of that application and the granting of the certificate do not permit of any other interpretation than that the scope of the authority granted, in No. MC–200 (Sub–60 TA), was limited precisely to routes and points named in the "order of February 3, 1945 in * * * No. MC–200, Sub 46." That is the one important and controlling fact necessary to a correct legal interpretation of the certificate issued in No. MC–200 (Sub–No. 60 TA), the only authority here involved. Other technical questions raised by plaintiff-appellant and considered by the Court below are unnecessary to any reasonable interpretation of this temporary authority.

Appellant has never claimed to the Commission, the Court below, or in the jurisdictional statement herein, that the above quoted portions of the application and certificate are not true and correct. Certified copies of the application (Exh. 13) and certificate (Exh. 16) are in the record of the Court below, and are designated in No. 6 of the Praecipe on Appeal. Appellant's jurisdictional statement, page 13, admits that the Commission report of June 2, 1952, here involved, is in evidence and contains in the Appendix thereto "the complete description of the points and places

and the manner of performing service specified in the certificate issued in Docket No. MC–200 Sub–No. 46)." The report, page 534, states that this appendix details the extent of Riss' authority to transport dangerous explosives under No. MC–200 (Sub–No. 60TA), from, to, and between the same points and in the same manner that it is authorized to transport other commodities under certificate No. MC–200 (Sub–No. 46). Since that was specifically the authority applied for and granted in MC–200 (Sub–60 TA), there can be no possible doubt, under the record herein, that the scope of that temporary authority is fully and correctly stated in the appendix to the report of June 2, 1952.

The detailed limits as set forth in such appendix constitute the entire authority applied for and granted, under MC–200 (Sub–60 TA), and any and all operations of Riss beyond such limits are unauthorized, unless under some other authority granted by the Commission. There are such other authorities recognized in the opinion of the Court below, page 24, (Exh. 21), not here concerned or disturbed. ***The question here relates to the claim of Riss that under the temporary authority granted in MC–200 (Sub–60 TA) operations beyond the territorial scope as detailed in MC–200 (Sub–46) and specified in the appendix to the report herein, were legally authorized. The Commission report held such operations were unauthorized.***

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The vital question decided by the Commission was the territorial scope of said temporary authority. The basic question decided by the Court below was that the Commission interpretation of the territorial scope of such temporary authority was lawful. The controlling issue presented by this appeal is whether or not the Court below erred, as a matter of law, in its decision. If that Court decision is legally correct it necessarily follows that the Commission's interpretation of this authority of appellant is also legally correct. *If both are legally correct operations of Riss beyond the territorial scope of its temporary certificate under MC–200 (Sub–60 TA) are certainly unlawful, and have been such since the issuance thereof April 15, 1946.*

The cease and desist part of the order of June 2, 1952, here involved, depends wholly upon the lawfulness of the Commission's interpretation of the temporary authority. Since that relates only to unlawful operations beyond the limits specified under the Commission interpretation, the cease and desist order must stand or fall with the final decision upon the question of interpretation. For these reasons the cease and desist order in no wise determines the lawfulness or unlawfulness of operations beyond the scope of the authority held, and is therefore not the determinative factor as to whether the Commission procedure was under a petition or complaint, or required the application of provisions of Section 204 (c) of the Inter-

state Commerce Act, 49 U. S. C., sec. 304 (c). That section provides for investigation, after notice and hearing, of any failure of motor carriers to comply with provisions of the Act or requirements established thereunder. The Commission is vested with no administrative authority to "compel" such compliance, and is wholly dependent upon court action to enforce obedience to its orders, prosecution under section 222 (a) by the United States Attorney, or by petition to the courts for injunction under Section 222 (b), 49 U. S. C. 322, which may be filed by the Commission.

The opinion of the Court below, pages 17, 18, 19 and 20, extensively considered the question of the proper procedure under a "petition" or a "complaint", and held the "petition" filed with the Commission "is the kind of thing meant by 'complaint' as used in 204 (c)." The Commission report, page 531, held that the "petition", in effect, sought an interpretation as to the territorial extent of temporary authority granted in No. MC–200 (Sub–No. 60 TA), and could properly be considered under rule 102 of its General Rules of Practice. That rule provides, when the subject matter of any desired relief is not specifically covered by the rules, "a petition seeking such relief and stating the reasons therefor may be served and filed." The Court below decided that the "complaint" required "notice and hearing" as provided in Section 204 (c),

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and proceeded to resolve that question on the basis of the record presented, by holding there was a proper "notice" to Riss, and an adequate "hearing" since the fact issue was conceded by admissions of appellant, leaving only a question of law to be decided by the Commission, as based upon official records in its files, viz., "the interpretation of the territorial limits of its Sub–No. 60 TA." (Opinion, pages 18 to 25, incl.)

It seems clear that the reference to "notice and hearing" in Section 204 (c) provided counsel with the opportunity to repeatedly claim that Riss had been denied a notice and hearing. It is equally clear that Riss was in fact accorded full notice and hearing, whether under the "petition" or the "complaint," as was decided by the Court. The argument respecting notice and hearing created so much confusion that it led the Court below to decide the question on the basis of Section 204 (c) requirements. That kind of hearing would be before an examiner, for the purpose of introducing testimony of witnesses. As the Court below held, the only fact question involved was whether or not Riss had been operating beyond the scope of its Sub–60 TA authority, which Riss admitted in its motion to dismiss, and left only the certificate interpretation for the Commission to decide, a question of law, requiring consideration only of official records subject to judicial notice by the Commission. Except for this admission an examiner hearing and proof of actual

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illegal operations would have been essential to issuance of the cease and desist order. Riss elected to move dismissal of the petition, rather than to answer and deny allegations therein, one of which was that Riss had been operating beyond the scope of its Sub–60 TA authority. Even without the actual admission of such operations the motion to dismiss, in legal effect, necessarily admitted facts alleged in the petition, and presented only a question of law as held by the Court below.

The cease and desist order was based upon appellant's admission as to its operations, which were beyond the territorial scope of the Sub–60 TA certificate as interpreted by the Commission. Except for that interpretation and the admission as to operations, there could have and would have been no cease and desist order. That part of the order was unnecessary to interpretation of the Sub–60 TA temporary authority.

**The Commission has authority to interpret certificates issued by it**

Appellant does not question Commission authority to interpret certificates of motor carrier. That it has such authority appears to be well established under various Court decisions. The opinion of the Court below, page 18, so held, with the statement, "Such is a necessary power to enable it to perform its duties under section 204 (a) (6) of the Act." 48 U. S. C. 304 (a) (6). That section provides "That it shall be the duty of the Commission * * * (6) to administer, execute,

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and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." Rule 102 above referred to was adopted under that authority, and was here applied, as stated in the report, page 531, in determining the procedure required for interpretation of this certificate. The report held that the petition sought that interpretation. It did not consider the cease and desist order until the primary question had been decided. It is then stated, pages 534–535, that in view of petition allegation of Riss operations, and that Riss had not denied the allegation but claimed its holding out to serve numerous points not embraced in the appendix, cessation of such unauthorized operations would be ordered. That was the natural legal consequence of the interpretation and was possible only because of admission of Riss. Perhaps the opinion of the Court below regarded the question of notice and hearing, as did the Commission, in respect to the interpretation, but the Court unnecessarily decided the "petition" was a "complaint" when the petition was considered as a unit. This is indicated by the opinion statement, page 18, to effect that the commission can exercise the power "even though it does so in a proceeding which seeks only a declaratory order construing a certificate," citing *Carroll Trucking Company Interpretation of Certificate,* 52 M. C. C. 178. Every court decision on the subject cited

by appellant and the Court below support Commission authority to interpret certificates, and those cases relate to permanent, not temporary certificates. The discretionary provisions of Section 210a indicate more certainly authority to interpret temporary certificates, perhaps "in its discretion and without hearings or other proceedings."

**The question of notice and hearing**

Appellant contends that it was not afforded "notice and hearing" as required in a "complaint" proceeding under Section 204 (c). Apparently the contention is designed to confuse the issue, by appearing to claim the right to hearing before an examiner, and seeking escape from the correct conclusion of the Court below, that the Commission procedure provided an adequate hearing. As stated by the opinion below Riss was served with a copy of the "petition" and replied thereto with a motion to dismiss. This refutes the continued contention that that notice was not given. The jurisdictional statement admits, page 3, that the motion to dismiss was filed, and after the report and order of June 2, 1952, a petition for reconsideration was filed June 30, 1952. The contention of appellant respecting "notice and hearing" never in any instance made any specification as to what issue or fact required a hearing before an examiner. There is no merit to the contention, as held by the Court below, considering the "petition" as a "complaint," and even less

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if considered as a "petition" as was done by the Commission. There is no legal purpose in having a formal hearing before an examiner upon a matter of law, where only official documents of the Commission have any bearing upon the issues. The report and order of June 2, 1952, here involved, are in the same docket, No. MC–200 (Sub-No. 60 TA), in which the certificate was granted. Had Riss denied operations alleged to be unlawful, and the competence of petitioners to so petition, a formal hearing before an examiner would have been legally necessary to provide evidence relating to those facts.

Admission of Riss made it possible to legally hear the "petition" by the Commission directly. The Interstate Commerce Act permits the Commission to hear and decide cases coming before it, or it *may* refer any matter to a Division or board of three members. The Commission may hear testimony and other evidence, and commonly does so. Court decisions do not preclude the Commission itself from hearing any matter that comes within its jurisdiction, or require reference to an examiner, a board, or a Division for hearing. That is made the discretion of the Commission under the Act. Section 17 (2) and (6), 49 U. S. C. 17 (2) (6). The procedural authority of Section 17 is applicable to motor carriers under Section 205 (b), and specifically preserves the discretion to direct hearings by any member, examiner, or joint board (c), except for joint boards re-

quired under (a). (49 U. S. C. 305 (a) (c) and (h). The Commission in hearing the proceedings herein was authorized to hear testimony and other evidence. Had Riss made any showing as to other evidence necessary to the decision the Commission had authority to receive it or to refer to a Division, board, or an examiner to hear and receive it. Riss has not disclosed any such evidence either to the Commission or to the Court, but has elected to rely upon the bare statement that it was entitled to a hearing. It was afforded a hearing, as the Court below held was adequate.

Apparently Riss chose to rely upon its contention that the certificate authorized operations to the extent of is claims under the Monark "grandfather" application, not limited to operations determined to be authorized in the Sub–46 proceedings. Whether that contention was and is legally correct is the decisive question presented herein. That contention was made in the Riss motion to dismiss and noted in the report, page 533.

The contention was made to the Court below. As stated in the opinion, page 26, it was, that the interpretation of the Commission is basically wrong because the authority under Sub–60 TA is not limited by the territorial restrictions in permanent certificate Sub–No. 46, but includes all points which it claimed to serve as successor to Monark "grandfather rights." The Commission held such contentions were untenable, page 534, since the temporary authority, by its very terms,

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is directly tied to the points authorized to be served in MC–200 (Sub–46). The precise territorial specification of Sub–46 authority in the February 3, 1945, order, was later approved by the courts as the final Commission order in that proceeding, 100 F. Supp. 468, 478 (1951), affirmed *per curiam* 342 U. S. 937 (1952). The report herein, page 534, states that points served under color of claimed "grandfather" rights, later found not supported by proof of *bonafide* operations on June 1, 1935, and continuously thereafter, are not in any conceivable sense "authorized" points. The report, page 532, notes that the actual certificate was issued after the order of February 3, 1945, and Court opinion, page 15, correctly notes the issuance date of the certificate as February 21, 1950. Beyond question the territorial limits specifically set forth in the order of February 3, 1945, are identical with the Monark certificate authority, set forth in the certificate issued February 21, 1950, and as set forth in the appendix to the report of June 2, 1952. If the Commission, in its discretion, may grant a temporary certificate without hearing or other proceeding, as the statute provides, the interpretation thereof must require no less discretion or different procedure.

The Carroll report is later referred to in the opinion, page 20, footnote 5, with statement that the Commission usually accorded hearings, apparently referring to Examiner hearing, where

the only issue is interpretation of a certificate. This is an erroneous statement, suggested by appellant arguments and repeated in its jurisdictional statement, page 12. In the first Carroll interpretation report, 52 M. C. C. 178 (1950), the decision was made on a petition, without hearing before an examiner. Only in the second Carroll case, 54 M. C. C. 664, (1952), was the question referred to an examiner for hearing, and then because the application proceeding involved the same parties and subject matter, and hearing was necessary to prove public convenience and necessity and fitness of applicant. The prior interpretation was affirmed.

The Court opinion, page 19, noted the Riss contention that a cease and desist order cannot be made by the Commission where the effect would deny the right, in an action under Section 222 (a) or 222 (b), to place in issue the scope of the certificate, and held the contention sound, since it would deny opportunity to challenge the Commission interpretation in a judicial proceeding against it. The opinion stated this to be the legal doctrine that Commission orders are not subject to collateral attack but must be tested judicially in direct review of such orders, citing as authority for such statements, *Southwest Freight Lines* v. *I. C. C.*, 8 Cir., 184 Fed. 149, 151; *I. C. C.* v. *G. & M. Motor Transfer Co.*, 64 F. Supp. 302, and *I. C. C.* v. *Consolidated Freightways, Inc.*, 41 F. Supp. 651, 655. Appellant in its jurisdictional

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statement, pages 13, 14, repeats this contention, citing as authority therefor the first two above cases by the Court opinion.

These contentions and holdings are clearly not supported by the cited authorities. The Court action herein is a direct challenge of the Commission interpretation of Sub–60 TA authority, upon the merits and legality thereof. That interpretation determines the limits of the original grant in Sub–60 TA, and presents the issue as to Commission authority to make the interpretation, and in that connection the legality of proceedings in which the order was entered. The cases cited support that authority. In *Consolidated Freightways* the Commission applied to the court for injunction under Section 222 (b), to restrain operations beyond the scope of that certificate. Consolidated contended that the order granting certificate was invalid and the opinion stated that it amounted to a collateral attack for which there is no foundation or basis in law. That case did not involve an interpretative order, except as essential to the institution of the action. In effect the holding as to collateral attack did not in any manner deny the right to attack the granting order. The Court held the action was merely to restrain unlawful operations prohibited by Section 306 (a), 49 U. S. C. 306, and required court interpretation of that certificate. The injunction sought by the Commission was granted.

In G. &. M. Transfer action by the Commission sought injunction to restrain operations beyond the scope of the certificate, *as previously interpreted by the Commission in a petition seeking clarification of the certificate.* The opinion there held that the certificate, as so interpreted, could not be subjected to collateral attack and that the Commission interpretation was binding upon the court. The Commission report interpreting the certificate, is quoted at length in the Court opinion, and leaves no doubt that the procedure was under petition seeking clarification, and was determined without examiner hearing on the basis of official records of the Commission. That is practically the same question and situation presented by the petition to the Commission herein, which was determined in the same kind of procedure and upon the same kind of official records. The difference is that G. & M petitioned for clarification of its own permanent certificate, whereas competing carriers petitioned for interpretation of the Riss temporary certificate. G. & M. did not directly challenge validity of the Commission order interpreting its certificate, as Riss does in this action. The Court therefore could only determine the question as to whether operations were beyond the scope of certificate as interpreted by the Commission. Here appellant directly challenged validity of interpretation and there can be no question as to collateral attack.

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In *Southwest Freight Lines* the action was in the Western District of Missouri and heard by the District Judge, one of the three judges constituting the Court which decided the action herein. That action sought an injunction under Section 222 (b) to restrain operations alleged to be unlawful as prohibited by Section 306 (a), not authorized by a certificate. The pleadings presented the issue as to the scope of certificate authority, and interpretation thereof by the Court. The Commission had not interpreted that certificate except as was essential to institution of the action. The Court opinion interpreted that certificate upon the basis of alleged specific operations which were admitted by defendant. That case presented only a question of law, construction of a certificate, and was decided on the basis of pleadings, admissions of defendant, and consideration of "definitive decisions of the Interstate Commerce Commission," as stated in official Commission reports cited, in other cases having no relation to that decided. One of the cases cited was the Commission report in the *G. & M. case,* 43 M. C. C. 497, concerned in the above cited court decision. The Court was relieved of the legal necessity to hear testimony as to actual operations by admission thereof by defendant. Here the Commmission was relieved of the legal necessity for hearing proof of alleged unauthorized operations by reason of admissions in the Riss motion.

Upon appeal by defendant in *Southwest Freight Lines,* cited by the Court opinion herein and the jurisdictional statement of appellant, the opinion stated the only issue there presented was "interpretation of the certificate granted to applicant by the Commission." That opinion did hold that appellant could not convert the injunction action into a direct attack upon validity of the order evidenced by the certificate involved, and explained that "the courts may not usurp the jurisdiction of the Commission by granting appellant what the Commission had denied." The opinion referred to the *G. & M. case* holding that the Commission interpretation of its certificate was conclusive on the court and added "In the circumstances of the present case, the Commission's interpretation of its certificate though less formal is no less effective." The "less formal interpretation" there referred to was the interpretation essentially involved in instituting the injunction action.

Appellant's jurisdictional statement, page 12, cites *Akers Motor Lines, Inc.* v. *Malone Freight Lines, Inc.,* 53 M. C. C. 353, and the court action directly attacking that Commission interpretation, *Malone Freight Lines, Inc.* v. *United States,* 107 F. Supp. 946, affirmed *per curiam,* 344 U. S. 925, as support for the contention that the Commission consistently afforded full opportunity for hearing upon such complaints although the only controverted issue was the proper interpretation

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of the terms of the authority. The report, page 354, states that defendant admittedly is engaged in transporting property as alleged in the complaint, apparently admitted at the examiner hearing. It was stipulated that complainants operated under certificates as described in certain exhibits. It seems clear that the only legal reason for referring that "complaint" to an examiner was that pleadings did not admit actual operations or the legal standing of complainants. Had those two facts been admitted by Malone's reply there would have been no legal requirement for examiner hearing. Here, as pointed out in the opinion of the Court below, the Riss motion to dismiss the "petition" did admit the actual alleged operations, and did not there or since in any manner question the standing of petitioners to file the "petition." Here, as held by the Court below, the Commission did afford Riss an adequate hearing, without examiner participation, because questions of law only were to be decided.

**Other questions presented**

Contention of appellant to the Commission and the Court below, that the pending permanent application, in MC–200 (Sub–84), filed August 22, 1947, more than one year after issuance of the temporary certificate in Sub–60 TA, continued the legal right to operate within the scope of the application claims in the Monark proceeding, has apparently been abandoned, since no reference

thereto is made in the jurisdictional statement. For that reason the question is no longer an issue.

The controversy here relates solely to temporary authority under Section 210a. That section provides for grant of authority immediately and urgently needed where there is no carrier service capable of meeting the need in Commission discretion without hearing or other proceeding, valid for such time as the Commission shall specify, but not more than an aggregate of 180 days. Because of the war needs the Riss Sub-60 TA authority has been extended far beyond the statutory aggregate permitted, and by virtue of Section 9 (b) of the Administrative Procedure Act, 5 U. S. C. 1008, has remained in force and effect for more than seven years since first issued. The certificate was issued and the repeated renewals thereof were granted upon the basis that operations were needed to the extent granted. The Commission had the right to assume that Riss operated within the confines of the certificate. Under the language of the application and certificate, the territory prescribed was exactly stated in the Sub-46 order of February 3, 1945, and therefore fully known to Riss. Operations beyond the territorial scope of the certificate was unauthorized, and performance thereof was deliberate. Both Riss and the Navy Department must have been aware that there was no authority

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to operate beyond the Sub–46 limits during the seven-year life of the Sub–60 TA certificate, and that authority in excess thereof could be quickly obtained from the Commission upon new applications. That opportunity for procuring temporary authority was called to the attention of the Navy Department, in the reply of the Commission Secretary to the letter of June 11, 1953, requesting extension of effective date of the order herein, and is attached to appellant's petition for stay pending appeal. It cannot be doubted that both Riss and the Navy Department were fully informed and understood that extension of effective date of that order would not extend the scope of the authority granted in Sub–60 TA. Surely Riss and the Navy know that operations begun after 1935 are made unlawful under Section 206 (a), unless authorized in a certificate issued by the Commission. That the Defense Department needed the service of Riss beyond the scope of its certificate, does not render lawful any operations beyond what is there authorized. Neither the desire of Riss, nor request of Navy, can legally make such operations lawful, since only the Commission has the power to issue certificates. The insistence of Riss, supported by Navy, that it has the right to operate beyond the scope of Sub–60 TA authority, because of defense needs, is no reason for evasion of the law. The implication that the Commission here seeks to

deny the Defense Department transportation which it needs, or to compel that the service be given to railroads, is simply untrue and is unworthy of consideration. The effort of Riss in this litigation is and has been to procure some semblance of legal protection for unauthorized operations. To sustain the technical contentions of Riss herein would be a dangerous precedent, in respect to Commission discretion in issuing temporary authority, requiring much more time and careful study of applications than has heretofore been given, particularly as to those relating to the needs of the Defense Department. The Commission could ill afford to grant such applications, if it were decided that interpretation of certificates issued under the liberal statute requires the time-consuming observance of the extremely technical procedures here contended for by appellant. It should be noted that every court decision cited by either side herein relates to permanent, not to temporary authority. Also very few decisions of the Commission in respect to temporary authority, of the many that have been entered, appear in the official reports and therefore may not be cited. In the absence of court decisions respecting interpretation of temporary certificates, the cases cited herein, relating to permanent certificates, apply with even greater force.

Contentions of appellant are without merit. Decision of the Court below is legally correct. The motion to affirm the judgment of the Court below should be granted.

Respectfully submitted.

Edward M. Reidy,
EDWARD M. REIDY,
*Chief Counsel.*

## APPENDIX

SEC. 204. [49 U. S. C., Sec. 304.]

(a) It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration;

SEC. 210a. [49 N. S. C., Sec. 310a.]

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.



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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1953**

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# No. 386

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RISS & COMPANY, INC.,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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## STATEMENT OF INTERVENING RAILROADS, APPELLEES, OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM, AND MOTION TO DISSOLVE STAY.

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AMOS M. MATHEWS,
FRANCIS J. STEINBRECHER,
LEWIN W. WICKES, JR.,
*Counsel for Appellees.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1953**

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# No. 386

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RISS & COMPANY, INC., A CORPORATION,
*Appellant,*

*vs.*

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
*Appellees,*

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY AND OTHER CLASS I RAILROADS,
*Intervenors-Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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## OPPOSITION TO STATEMENT AS TO JURISDICTION, MOTION TO AFFIRM OR DISMISS, AND MOTION TO DISSOLVE STAY.

These appellee railroads, intervenors before the Court below, submit this statement in opposition to appellant's statement as to jurisdiction, and in support of their motion

to dismiss or affirm and motion to dissolve temporary stay, respectfully show:

## Statement of the Case

This appeal involves a controversy before the Interstate Commerce Commission concerning the interpretation of a permit of temporary authority granted by the Commission to appellant.

The issues involved are very simple, despite appellant's efforts to make the case look complex.

### 1. The Appellant Has Not Exhausted Its Administrative Remedies

In the present case, in the Commission's report (54 MCC 531) interpreting appellant's authority, the Commission said:

> "The transportation of dangerous explosives by Riss is authorized only to the extent indicated in the appendix. Any other service in the transportation of dangerous explosives is not authorized in No. MC-200 (Sub-No. 60TA). If there is a need for additional transportation service, it may be met by the filing of further properly supported applications for temporary or permanent authority."

This indication by the Commission of the proper procedure to be followed by Riss is contained in the Commission's report of June 2, 1952. It was not until over fourteen months later, August 25, 1953, the day after Riss took this appeal, that Riss actually applied for temporary authority, as suggested by the Interstate Commerce Commission. Riss persisted for over a year in the performance of operations which the Commission had held illegal. Certainly, if it is proper for Riss to file an application for temporary authority pending this appeal to the Supreme Court, it could

have, with equal propriety, filed the application as early as June 3, 1952, pending its first petition for reconsideration by the Commission of its order of June 2.

Appellant, therefore, has not exhausted its administrative remedies before the Interstate Commerce Commission. The granting or withholding of temporary authorities is a matter peculiarly within the power and discretion of the Commission under Sec. 210a. (a) of the Interstate Commerce Act:

> "(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter."

The appellant even now is proceeding before the Commission under this section to obtain the very rights involved in this appeal. Therefore, it is clear appellant has not exhausted administrative remedies available to it under the Interstate Commerce Act.

**2. In Any Event, the Appeal Involves No Question of Substance and the Supreme Court Should Dismiss or Affirm.**

The assignment of errors, while prolix and repetitive, actually raises no question of substance.

The issues involved are starkly simple. The extended proceedings have brought forth a plethora of detailed argu-

ments on the procedure and merits. The simplicity of the issues, therefore, may be better appreciated by brief review of the case from the beginning.

Appellant filed an application [1] for the Sub 60 temporary authority involved in this appeal, and the Interstate Commerce Commission issued the permit.[2] Assuming, for illustration, that the permit authorized appellant to operate between A and B,[3] appellant interpreted the authority to cover A, B, X, Y, and Z,[4] and it openly and notoriously and to the knowledge of the Commission operated in this fashion.[5]

The railroads, having authority to operate between all these points and being injured by the unauthorized diversion of traffic, filed a petition asking the Commission to issue a

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[1] The application filed on March 1, 1946, requested "temporary authority . . . to June 30, 1946 . . . to transport explosives . . . over regular . . . routes between points named in I.C.C. order of February 3, 1945 in . . . MC-200, Sub 46 (formerly Monark Motor Freight System, Docket MC-30077). A map of proposed regular routes . . . is attached hereto and made a part hereof. . . ." According to appellant, therefore, the map shows the "regular . . . routes between points name in I.C.C. order of February 3, 1945 in . . . MC-200 Sub 46 (formerly Monark Motor Freight System, Docket No. 30077)."

[2] The I.C.C. order in MC-200, Sub 60TA of April 15, 1946, granted the application without hearings or other proceedings and gave plaintiff temporary authority to transport dangerous explosives "To, from, and/or between points and places authorized to be served in connection with Docket Nos. MC-30077 and effective sub numbers thereunder which were acquired by applicant herein."

[3] ". . . points and places *authorized to be served* in connection with Docket Nos. MC-30077. . . ."

[4] Appellant contends the authority covers "points *claimed* in Docket MC-30077," even though not included in the earlier order of February 3, 1945.

[5] The Interstate Commerce Commission (Report of June 2, 1952) said: "As seen, petitioners allege that Riss [Appellant here] has been performing service in the transportation of dangerous explosives at points not included in the appendix herein. Riss has not denied this allegation, but rather claims and, in effect, holds itself out to transport dangerous explosives to numerous points not embraced in the appendix." 54 M.C.C. 531.

cease and desist order to prevent appellant from exceeding its lawful authority. In its answer the appellant stated that it was, in fact, operating between A, B, X, Y and Z,[6] but contended that this was the scope of the authority as issued. Thus, the only possible issue of fact, the extent of appellant's actual operations, was never in question. The record before the Commission consisted of appellant's application for the Sub 60TA, the permit itself, and any documents incorporated by reference by the application and permit, and finally, the pleadings raising the question of interpretation, namely, the petition for a cease and desist order and the appellant's answer.

This record contained everything upon which the Commission issued the permit. The pleadings (petition for cease and desist order and answer thereto) raised two issues: (1) the extent of appellant's operations; and (2) the scope of the authority. The first issue and the only one of fact was resolved by the appellant's statements in its answer. Hence, the only question remaining before the Commission was that of the disputed interpretation of its permit. The Commission decided this question favorably to the railroads' contention—that is, that the permit covered only "A and B," and any operations in excess of that were unlawful.[7]

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[6] "During the course of the proceedings in Sub-No. 84 which have lasted over four years, Riss has shown extensive operations under Sub-No. 60TA which the railroads now claim to have been illegal." Motion to Dismiss and Answer of Riss and Company, Inc., to Petition of Eastern Railroads and Class I Railroads in Western Territory for Issuance of a Cease and Desist Order.

[7] The grant defined in the Commission's decision is the same, the Commission says, as the original grant of April 15, 1946. In its terms the report grants by specifying in detail what the original order had granted by reference to MC-30077. The cease and desist order merely limits the grant to the same extent as it was limited by law in the original order of April 15, 1946 by specifically directing the plaintiff not to go beyond the scope of the grant.

The appellant has persistently complained that it was not afforded a hearing. The three-judge court, from whom this appeal is taken, decided that appellant was afforded a hearing which fully met the requirements of the Interstate Commerce Act, and Administrative Procedure Act and the Commission's rules. While the appellant asserts that it should have had and desires a hearing (apparently, in the narrow sense of an oral presentation of evidence by witnesses), it has never at any stage of the proceedings before the Commission or the court below specified one iota of evidence which it would produce. Appellant has constantly complained that in the absence of a "hearing" it was not given an opportunity "to cross-examine witnesses." No other party to these proceedings has proposed to introduce the testimony of any witnesses, so that it is impossible to determine who the appellant wants to cross-examine. The only question of fact, the scope of appellant's actual operations, is not put in issue by the pleadings; it is fundamental, therefore, that no tribunal would be justified in hearing the testimony of witnesses concerning the scope of appellant's operations. The only other question for determination by the Commission was the scope of appellant's authority, Sub 60 TA. The petition for a cease and desist order was filed in this docket, as were all subsequent pleadings, including appellant's answer and motion to dismiss, its petition for reconsideration, and the various replies thereto. It was on the basis of the record in this docket that the Commission originally issued the permit granting the temporary authority. It would be absurd to think that the Commisison could not properly *interpret* the permit on the basis of the very same record upon which it *issued* the permit.

It is apparent from the above that appellant had every opportunity to be heard, was heard, and that its position and arguments were carefully considered by the Commission.

It has been the railroads' consistent position that the petition for cease and desist order was properly filed under the Commission's General Rules of Practice, Rule 102, providing for relief not otherwise provided for in the rules of practice. The Commission so held. There is no requirement for a hearing of issues raised by petitons under Rule 102 in the Commission's rules or in any applicable statute. Hence, we believe the Commission might well have interpreted the permit on the basis of the record on which the permit was issued without further procedure. Nevertheless, the appellant was notified of the filing of the petition, and the appellant was afforded the opportunity to and did answer, and after the Commission's decision appellant petitioned for reconsideration. Each of these steps by appellant was delayed at appellant's request by permission of the Commission.

The appellant contended that the petition should be treated as a complaint under Section 204(c) of the Interstate Commerce Act, and this Section requires that respondent have an opportunity to be heard. It has been our position that, even assuming with appellant that the petition should be treated as a complaint, the only question of fact was resolved by appellant's admission in its answer, and any oral hearing on this question would, therefore, under the most fundamental rules of pleading be superfluous and vain, and further, that on the issue of the interpretation of its authority, appellant had an opportunity to be heard in its further pleadings. It is of the greatest significance that never in any document or argument before any tribunal considering this case has the appellant specifically described one scintilla of evidence which it would propose to introduce in any oral hearing. The court, from which this appeal was taken, held that the petition should be treated as a complaint, but that appellant was heard, had its day in court, and was

deprived of no right in the determination of the issues raised in connection with the interpretation of the permit.

Hence, under any possible interpretation of the legal requirements of the procedure before the Interstate Commerce Commission, the appellant has been deprived of no right and its interests have not been prejudiced. Appellant's effort, therefore, to breathe into the narrow question of the scope of its temporary authority some broad significance affecting motor carriers generally, is completely without merit. The only question involved in these proceedings is the scope of appellant's temporary authority. By no stretch of the imagination can this be expanded into a matter of significance to anyone except the appellant and his immediate competitors. It is not a question of broad scope or of interest to the industry in general. Furthermore, the question of the interpretation of a single permit issued by the Interstate Commerce Commissoin is certainly one peculiarly within the special competence of the Commission itself.

One possible question remaining is the scope of the reviwe by the three-judge court. The court, in its first opinion, dismissed the appellant's complaint on the basis that the appellant had not met its burden of proof in that appellant failed to produce before the district court a copy of an order of the Interstate Commerce Commission in ICC Docket MC 200 Sub. 46. In its motion for new trial, plaintiff contended that the order in question was sufficiently before the court, that the court should take judicial notice of the order, that there was no question which needed to be considered in the light of the scope of the order, and then proceeded to re-argue the merits of the case. The other parties in one fashion or another granted that the order was sufficiently before the court, and the interested defendants, namely, the railroads, argued the merits *in extenso* in arguing the motion for new trial. The court dismissed the motion for

new trial without opinion or discussion. Obviously, therefore, the court considered all the arguments of all the parties presented to it at that time, including the merits, in dismissing the motion for new trial, and, therefore, ultimately dismissing the complaint, fully affirmed the I.C.C.

Read in the light of the above statement, the assignments of error obviously do not raise any question of substance.

WHEREFORE these appellees respectfully move that the appeal be dismissed, or that the judgment of the District Court be affirmed.

### 3. By Reason of Appellant's Delay in Invoking the Administrative Remedy Open to It, It Has Forfeited Any Right to Further Stay.

Riss has persisted in the performance of operations which the Commission has held illegal for over fourteen months, meanwhile protecting itself through this series of appeals even though, as shown, it has been given every opportunity to be heard. Furthermore, this experienced litigant has at no time alleged any specific fact which it might prove in an oral hearing. It has thus not shown that it was damaged in any way. Certainly a sincere effort to comply with the views of the administrative agency would have called for a prompt and proper application for temporary or permanent authority rather than mere arrogant persistence in continuing unlawful operations. And, furthermore, appellant's own estimate of the merits of the present appeal is shown by the simultaneous application for temporary authority in which appellant stated that it will, on September 1, 1953 (expiration of District Court's stay pending appeal), no longer have authority to render the service.

Hence, having so far delayed the perfectly proper cease and desist order of the Commission until a point at which it must inevitably become effective, Riss has finally seen fit to follow a proper and orderly procedure in an effort to

legalize a part of the extensive unlawful operations it has been carrying on. Even now, appellant has not yet applied for temporary authority to cover some of the operations held unlawful by the Commission and as to these appellant's laches are even more flagrant.

Continuance of these unlawful operations by Riss diverts traffic and revenue from competitors duly authorized to handle it, including these appellees. It would be unconscionable to continue in effect a stay permitting these operations when appellant has failed for 14 months to apply for temporary authority for some of them and even now has not taken this step as to the rest.

WHEREFORE appellees respectfully move that the Court dissolve the temporary stay granted in this proceeding by Mr. Justice Clark.

Respectfully submitted,

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No. 386. RISS & CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Missouri. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *John B. Gage* and *A. Alvis Layne, Jr.* for appellant. *Acting Solicitor General Stern* for the United States; *Edward M. Reidy* for the Interstate Commerce Commission; and *Amos M. Mathews* for the Akron, Canton & Youngstown Railroad Co. et al., appellees.

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